87-564 No. 87-

Supreme Court, U.S.
FILED
OCT 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LORILLARD, INC.,

*Petitioners,*

vs.

ANTONIO CIPOLLONE, Individually and as Executor of the Estate of Rose D. Cipollone,

*Respondent.*

LIGGETT GROUP INC., LORILLARD, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

*Petitioners,*

vs.

SUSAN HAINES, as Administratrix ad Prosequendum and Executrix of the Estate of Peter F. Rossi,

*Respondent.*

## APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**Opinion of the Court of Appeals**
**dated June 8, 1987**

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ANTONIO CIPOLLONE,
Individually and as the Executor of
the Estate of Rose D. Cipollone,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants-Petitioners.

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SUSAN HAINES,
as Administratrix ad Prosequendum
and Executrix of the Estate of Peter F. Rossi,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R.J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO CO.,
THE TOBACCO INSTITUTE, and
LOEW'S THEATRES, INC.,

Petitioners,

—v.—

HONORABLE H. LEE SAROKIN,
United States District Judge,
District of New Jersey,

Nominal Respondent.

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No. 87-5014

United States Court of Appeals,
Third Circuit
Decided June 8, 1987

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Before: GIBBONS, *Chief Judge*,
SEITZ and GARTH,
*Circuit Judges*

## OPINION OF THE COURT

GIBBONS, *Chief Judge:*

The defendants in several product liability actions pending in the district court petition here pursuant to 28 U.S.C. § 1651 (1982) for a writ of mandamus (1) directing the district judge to vacate an order modifying a discovery order previously entered by a United States magistrate, and (2) reassigning the cases to another judge. Petitioners contend that the challenged order is inconsistent with the mandate of this court in *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986), and is otherwise inconsistent with law. They contend, as well, that the district court judge should be removed from the case because of bias against the defendants' industry. We deny the petition for mandamus and for reassignment.

### I.
### Prior Proceedings

The *Cipollone* case is one of eight actions filed on behalf of cigarette smokers in the state and federal courts of New Jersey by the same law firm. There are presently over 100 such cases pending in other jurisdictions. Plaintiffs in all of them are cigarette smokers or their personal representatives who have filed product liability suits asserting negligence, strict liability and intentional wrongdoing by tobacco companies. Claiming that their lung cancer or other smoking-related disease resulted from smoking defendants' cigarettes, the plaintiffs in those actions allege that the defendants failed to inform consumers adequately of the health risks in smoking and that when health warnings did appear on their products, they were effectively negated by their advertising practices.

This case began in the United States District Court for the District of New Jersey, when Rose Cipollone and her husband, Antonio, filed a complaint on August 1, 1983 against Liggett Group, Inc., Phillip Morris, Inc., and Loew's Theaters, Inc., all

of which manufacture cigarettes. Cipollone alleged that as a result of smoking defendants' cigarettes for almost forty years, she developed bronchogenic carcinoma and sustained other personal injuries. Cipollone sought compensation for her injuries on theories of strict liability and negligence and her husband sought compensation for loss of consortium. Cipollone's primary contentions were that the defendants had withheld scientific evidence from the public and had misrepresented the health hazards of smoking.

A short time later, Susan Haines, administratrix ad prosequendum and executrix of the Estate of Peter F. Rossi brought an almost identical action in the same court against the same defendants as well as R.J. Reynolds Tobacco Co. and the Tobacco Institute, Inc. Haines had the same counsel as Cipollone and sought compensation for Rossi's pain and suffering and compensation for his death, which allegedly resulted from his smoking defendants' cigarettes.

Pursuant to 28 U.S.C.§ 636 (1982 & Supp. III 1985), the district court ordered discovery in both cases under the supervision of then Magistrate Robert E. Cowen. In the fall of 1983, Cipollone made initial discovery requests of the defendants. The defendants responded by filing motions to strike, claiming that the information sought was irrelevant and that the requests were burdensome and harassing. Magistrate Cowen heard oral argument on those motions on March 22, 1984. A discovery order was issued on May 2, 1984.

Defendant's counsel then approached Cipollone's counsel about a confidentiality order. Counsel agreed temporarily not to disseminate any documents "until [they] had an opportunity to attempt to agree upon a Protective Order regarding the documents or, if that [was] not possible [defendants were] to make request for such a Protective Order to the Court." Letters between counsel dated May 3 and 4, 1984. That agreement was in force until the entry of Magistrate Cowen's protective order dated March 25, 1985. In the interim, defendants produced thousands of documents and many corporate representatives were deposed. Additionally, discovery of non-parties, including the Tobacco Institute, was conducted. Cipollone's

counsel and the Tobacco Institute's counsel agreed that if Cipollone wished to disclose confidential material received as a result of that discovery, ten (10) days notice would be given to allow the Tobacco Institute to object. *See* Letter Agreement dated August 2, 1984. Accordingly, on October 5, 1984, Cipollone's counsel notified the Tobacco Institute of the intention to disseminate certain confidential documents. *See* Letter from Marc Z. Edell dated October 5, 1984. Because the Tobacco Institute objected, however, the information was not disseminated.

Meanwhile, negotiations regarding the terms of a protective order broke down because the parties could not agree on Cipollone's counsel's right to use the documents obtained in this discovery in other cases, and because of the defendants' alleged misuse of the "confidential" stamp on documents produced during discovery. On March 25, 1985 Magistrate Cowen entered a protective order for the stated purpose of streamlining the litigation. No specific findings of good cause for the issuance of the protective order were made.

On March 25, 1985, Cipollone appealed the magistrate's order and the district court, on July 17, 1985, vacated that order and entered a modified order. *See Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573 (D.N.J.1985). Defendants then petitioned this court for a writ of mandamus, which was granted. *See Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1118 (3d Cir. 1986). Granting the writ, we held that the district court had committed two errors of law: 1) it had applied the wrong standard for issuance of a protective order—first amendment considerations—rather than the less strict "good cause" standard under Fed. R. Civ. P. 26(c); and 2) it had exercised plenary review over the magistrate's order instead of the review specified in 28 U.S.C. § 636. *See Cipollone*, 785 F.2d at 1123.

In response to our judgment, Judge Sarokin reconsidered the protective order. He noted that the magistrate had made no specific findings regarding good cause. Judge Sarokin held that the magistrate's failure to apply a good cause standard was a clear error. *See Cipollone v. Liggett Group, Inc.*, 113 F.R.D.

86, 93 (D.N.J. 1986). After considering the defendants' arguments for finding good cause, the district court rejected them. With regard to the magistrate's determination of an "umbrella order," the district court upheld "the aspect of the magistrate's order that permits defendants to make an initial designation of confidentiality, subject to their determination that such designation is warranted in good faith, and subject to plaintiff's later opportunity to challenge such designation and request sanctions pursuant to Fed. R. Civ. P. 26(g)." *Cipollone*, 113 F.R.D. at 94. Consequently, on December 18, 1986, the district court entered a new modified protective order and issued a supplemental opinion. *See Cipollone v. Liggett Group, Inc.*, Civ. No. 83-2864 (D.N.J. Dec. 18, 1986). The magistrate's protective order remained unchanged except that the district court limited the scope of the order's protection to "confidential" documents and permitted the use of documents in other related actions.[1]

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[1] Eleven paragraphs of the magistrate's order were included verbatim. The changes [italicized] are set forth in a comparative table as follows:

| *Magistrate's Order* | *District Court's Order* |
|---|---|
| 2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation) shall be used solely for the purpose of this case. | 2. All *"confidential"* information produced by defendants in the course of this civil action or any appeal arising therefrom (the "litigation") *may be used in all related or similar cases subject to the terms and conditions of this order.* |
| | 3. *Any plaintiff seeking to use "confidential or nonconfidential" information from this matter shall seek leave of the court before whom that matter is pending.* |
| 3. "Confidential information" as used herein means any information which is designated as "confidential," whether it be a document, information contained in a document, | 4. "Confidential information" as used herein means any information which is designated as "confidential" whether it be a document, |

*(footnote continued)*

Defendants then petitioned again for mandamus, claiming that the district court's order on remand is contrary to law and contrary to this court's instructions. In addition, they request reassignment of this case to another judge, suggesting bias against the defendants on the part of Judge Sarokin.

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information revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as confidential only upon the good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.

information contained in a document, information revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as confidential only upon good-faith belief that the information falls within the scope of "confidential" information under the Federal Rules of Civil Procedure and the precedents thereto, *including this Court's opinions in this case. Counsel shall have the right to challenge, by motion, the designation of any document as "confidential" and, if the objection is sustained, sanctions may be imposed upon the party making the designation, if not made in good faith, including attorney's fees and the reasonable expenses incurred by counsel pursuant to Fed. R. Civ. P. 26(g).*

6. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and defendants in this litigation, any lawyers specifically employed by them in connection with the litigation and any employee of such counsel assisting with this litigation; and

(b) Experts retained by or on behalf of any party to provide assistance or

7. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and defendants in this litigation, or *where authorized in other litigation*, any lawyers specifically employed by them in connection with the litigation and any employee of such counsel assisting them; and

*(footnote continued)*

## II.
## Scope of Review in Mandamus

In *Sporck v. Peil*, 759 F.2d 312, 314 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985), we set forth the standards for issuing a writ of mandamus. Two requisites must be found: a) the

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testimony in connection with this litigation.

7. Each person, other than those described in Section 6(a), to whom designated confidential information or documents are to be disclosed shall, prior to disclosure, agree in writing under oath or attestation to the following, a *copy of which shall forthwith be furnished to all counsel:*

I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of [ ], 1985, in *Cipollone v. Liggett Group Inc., et al.*, the United States District Court for the District of New Jersey; that I have been given a copy of and have read the Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except in accordance with the Protective Order, such information or documents, and that such information or documents shall be used only for the purposes of the legal proceedings in which they were produced.

(b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with the litigation *or where authorized in other litigation.*

8. Each person, other than those described in Section 7(a), to whom designated confidential information or documents are to be disclosed shall, prior to such disclosure, agree in writing under oath or attestation to the following:

I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of [ ] 1986, in *Haines v. Liggett Group Inc., et al.*, the United States District Court for the District of New Jersey; that I have been given a copy of and have read Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except in accordance with the Protective Order such information or documents, and that such information or documents shall be used only for the purpose of the legal proceeding in which they were produced.

*(footnote continued)*

party seeking the writ must have "no other adequate means to attain the relief he desires," *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980), and b) the trial court must have

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I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of court, imposed by the Court, for such a failure.

*Copies of this attestation shall be served upon all counsel prior to such disclosure; in lieu of such service, copies of the attestation signed by medical experts may be filed under seal with the court, for the period prior to the identification of such experts in pretrial discovery.*

I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of Court, imposed by the Court, for such a failure. *Copies of this attestation shall be filed under seal with the court.*

13. Within forty-five (45) days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of documents, and all information and notes derived from them,

14a. Within forty-five (45) days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all *confidential* documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of *confidential* documents,

*(footnote continued)*

committed a clear error of law. As we stated in *Cipollone*, 785 F.2d at 1118, "[m]andamus is not available for abuse of discretion." The Supreme Court has stated that a writ of mandamus is not readily issued:

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shall be destroyed. Compliance with this provision shall be certified to by all counsel for the obtaining party or parties.

and all information and notes derived from them, also shall be destroyed. Compliance with this provision shall be certified to by all counsel for the obtaining party or parties.

17. This Order shall be binding upon any future party to this litigation.

17. This order shall be binding upon any future party to this litigation *and any other party utilizing such discovery pursuant to the authority of any other court, and all proceedings arising under it are referred to the magistrate for disposition.*

18. *Anything to the contrary notwithstanding, confidential information may be delivered to counsel in other related or similar actions provided the court in such action permits same and provided further that the conditions of confidentiality imposed herein are imposed in said action.*

> Extraordinary writs are "reserved for really extraordinary causes". . . , and then only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. . . ."

*Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964) (citations omitted). "[T]he moving party [must] satisfy 'the burden of showing that its right to issuance of the writ is "clear and indisputable" '." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978) (citation omitted). The respondents do not dispute that errors with respect to the scope of a protective order probably cannot be corrected by a post-trial appeal. They dispute only whether the second requisite for mandamus has been met—that is, whether the trial court committed a clear error of law.

## III.
## Discussion

The gravamen of the petitioners' argument in the instant petition for mandamus is their disagreement with Judge Sarokin's refusal, on remand, to uphold paragraph 2 of the magistrate's protective order. Paragraph 2 of the magistrate's order states that "[a]ll information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case." Judge Sarokin, in his protective order of December 18, 1986, replaced that paragraph with paragraphs 2 and 3 which state:

> 2. All *"confidential"* information produced by defendants in the course of this civil action or any appeal arising therefrom (the "litigation") *may be used in all related or similar cases subject to the terms and conditions of this order.*
>
> 3. *Any plaintiff seeking to use "confidential or non-confidential" information from this matter shall seek leave of the court before whom that matter is pending.*

*(changes italicized).*

*A. District Court's Scope of Review Under Section 636*

Petitioners' first argument is that the district court erred again by engaging, on remand, in an impermissible plenary review of the magistrate's orders rather than applying the "clearly erroneous or contrary to law" standard. Under 28 U.S.C. § 636, a magistrate may hear and determine pre-trial matters, which are subject to reconsideration by the district court "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." *Id.* at § 636(b)(1)(A). Petitioners make two contentions to substantiate this argument.

First, petitioners argue that the district court's "good cause" determinations continued to be based improperly on a concern for the public interest rather than on the interest of the litigants or case management. In support, the petitioners contend that the magistrate's paragraph 2 imposed no burdens on the respondent and that respondent never complained that the paragraph impeded her ability to go forward with her case. The provisions, the petitioners argue, merely prevented injury to them and expedited discovery. Citing to a passage in the district court's opinion, the petitioners insist it proves that the court had a "continuing conception that the *public* has some legitimate interest in the pretrial disclosure of cigarette company documents," Petitioners' Brief at 17 (emphasis in original).

The district court stated:

> . . . It is inconceivable to this court that under [the] circumstances the public interest is not a vital factor to be considered in determining whether to further conceal that information and whether a court should be a party to that concealment.
>
> However, even ignoring the public interest, defendants have failed to demonstrate any good cause for the concealment of otherwise non-confidential materials from the public in general.

*Cipollone*, 113 F.R.D. at 87. Petitioners have taken this statement out of context. Judge Sarokin clearly stated that "[t]he Third Circuit has made it clear that first amendment considerations are not implicated in this analysis. It is thus this court's duty to abide by that mandate." *Id.* After that statement, Judge Sarokin went on to express his concern about that ruling, by stating: "However, the court expresses its concern if the public interest is eliminated as a factor in determining whether discovery should be protected from disclosure." *Id.* The passage relied on by petitioners followed, and served as an explanation of Judge Sarokin's concern. Furthermore, there is no indication in the opinion that Judge Sarokin, in making "good cause" determinations, considered the public interest in the documents.

The second contention the petitioners raise in support of their section 636 argument is that, on remand, the district court failed to apply the "clearly erroneous or contrary to law" standard but rather continued to substitute its own judgment for that of the magistrate. The petitioners argue that the district court did not attempt to identify the grounds upon which the magistrate's general finding of good cause was based. As proof that the district court did not apply the proper standard of review, the petitioners quote from the first district court opinion vacating the magistrate's order, which stated:

> In the usual private litigation not involving the public interest, it would not be appropriate to permit the release of private materials whose existence and content were disclosed only as the result of the litigation.

*Cipollone*, 106 F.R.D. at 576. From all of this, the petitioners conclude that "[i]f the district court had in fact abandoned its special public interest test, it could not possibly have found *clear error* in the entry of the magistrate's orders." Petitioners' Brief at 19 (emphasis in original).

Contrary to the petitioners' assertions, however, the district court made specific findings that the magistrate's determination of "good cause" was "clearly erroneous and contrary to law." The court stated:

> In summary, the magistrate's finding that defendants had shown good cause to support an order that nonconfidential discovery "shall be used solely for the purpose of this case" is clearly erroneous and contrary to law. To the extent that the magistrate found good cause based on embarrassment to defendants, the effect of dissemination on the fairness of trial, or the prior conduct of plaintiffs' attorney, the finding is clearly erroneous. To the extent that the magistrate found good cause based on a desire to facilitate discovery or to prevent an abuse of the discovery process, the finding is contrary to law.

*Cipollone*, 113 F.R.D. at 93. In fact, Judge Sarokin correctly noted in his opinion that "[t]he magistrate's protective order did not contain specific written findings that good cause existed for prohibiting plaintiffs either from disseminating the fruits of nonconfidential discovery to the public or from utilizing discovery in other litigation." *Id.* at 89.

Although Magistrate Cowen mentioned good cause in the March 25, 1985 protective order, the only stated reason for that order was his desire to streamline the discovery process. *See* Transcript of Proceedings of March 25, 1985 Before Magistrate Cowen at 56. Thus, it was completely logical for Judge Sarokin not to "attempt to identify the grounds upon which the magistrate's general finding of good cause was based." *Cipollone*, 113 F.R.D. at 89 n.2. Instead, Judge Sarokin reviewed "the order itself, the transcript of the proceedings before the magistrate and defendants' briefs and oral arguments," *id.* at 89, and found five specific arguments for "good cause" under Rule 26(c). They were that (1) the defendants would suffer financial and other embarrassment; (2) fairness at trial would be compromised; (3) the plaintiffs were estopped from disseminating this material by plaintiffs' counsel's prior agreement; (4) discovery in this case would be facilitated; and (5) dissemination would constitute an abuse of the discovery process. The district court then examined the record with respect to each argument and concluded that none of the arguments

supported a finding of good cause for an order limiting the use of nonconfidential documents solely to this case. The court specifically ruled that to the extent that the magistrate found good cause based on them, those findings were "clearly erroneous" or "contrary to law." *Cipollone*, 113 F.R.D. at 93.

B. *Concerns of Case Management*

Additionally, petitioners urge that the district court acted inconsistently with this court's mandate and contrary to law in rejecting the magistrate's concern about case management as an important basis for the entry of his protective order. That concern appears, however, to have been, not an important basis, but rather the sole basis for the magistrate's protective order, for in entering it Magistrate Cowen stated:

> In the event this decision is appealed or reviewed by higher authority, I want the record to reflect that it's my opinion, it's my judgment that having this order in place will facilitate the efficacious production of documents and discovery of the defendants to some extent and that it will streamline the litigation to the point where the discovery sought and had in this case will be for this case and this case alone, and that at the time this case is tried that, of course, anything that goes into the record at that time will be of a public matter and public information.

Transcript of Proceedings of March 25, 1985 Before Magistrate Cowen at 56. No other reason for entry of the order was mentioned. Cipollone argues that the district court did not reject concerns of case management as "a" basis for a protective order but merely rejected it as the *sole* basis, where the court does not make specific and particularized findings of good cause under Rule 26(c).

Cipollone is correct in this respect. The district court held:

> The magistrate's reasoning, though based on commendable motives, misconstrues the nature of the

> "good cause" requirement of Rule 26(c). The magistrate apparently felt that limiting the use of discovery to this case alone would "secure the just, speedy and inexpensive determination" of this action, consistent with the intent expressed in Rule 1 of the Federal Rules. Rule 26(c), however, does not empower individual courts to make such policy decisions. The Rule allows a court to "protect a party or person" – the focus is on injury to a specific individual, not on general concerns of case administration. Rule 26(c), understood as a piece of a larger framework, reflects a policy decision that the "just, speedy and inexpensive" determination of actions is best furthered by permitting the entry of protective orders only to prevent injury to individuals.
>
> The Third Circuit explanation of "good cause" recognizes that the Rule 26(c) inquiry must focus on the harm defendants will allegedly suffer from dissemination of discovery material. The Third Circuit directed this court to test defendants' allegations of harm against the legal standards they provided. Nowhere in the Third Circuit's directive is this court told that the "good cause" supporting a protective order may be general concerns of trial administration.
>
> The magistrate's rationale that entry of the protective order would facilitate and streamline this litigation is not sufficient "good cause" under Rule 26(c).

*Cipollone*, 113 F.R.D. at 92-93.

The district court's summary of the Third Circuit's mandate in this respect is quite accurate. Judge Becker stated:

> . . . the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,

> do not satisfy the Rule 26(c) test. . . . Moreover, the harm must be significant, not a mere trifle. . . .
>
> Although there appears to be a lurking dispute as to what may constitute good cause for a protective order, *see* discussion, *supra* at pp. 1114-15, we are satisfied that the district court understood and will apply on remand the principle that Rule 26(c) protects parties from embarrassment as well as from disclosure of trade secrets. We add to the district court's comments only our own understanding that, because release [of] information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground. *Cf. Joy v. North*, *supra* (a protective order will not issue upon the broad allegation that disclosure will result in injury to reputation); to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.

*Cipollone*, 785 F.2d at 1121 (citations omitted). Judge Becker clearly focused upon the issue of particular need for *party* protection, not upon general concerns of trial efficiency. Therefore, the district court's ruling is not inconsistent with our mandate.

The petitioners further argue, however, that the district court's rejection of concerns of case management conflicts with our recommendation of the use of umbrella protective orders as "a useful method of dealing with large-scale discovery." *Id.* at 1123 (footnote omitted). This is a disingenuous argument and

the quote is taken out of context. The quote came at the end of a discussion about an umbrella order approach versus a document-by-document approach to determine confidentiality. *See id.* at 1122-23. Judge Becker stated:

> Under this approach, the umbrella order would initially protect all documents that the producing party designated in good faith as confidential. After the documents delivered under this umbrella order, the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents. The burden of proof would be at all times on the movant; only the burden of raising the issue with respect to certain documents would shift to the other party.

*Id.* at 1122 (footnote omitted). In response, the district court abandoned its document-by-document approach and instead adopted in paragraph 4 of its modified protective order, exactly what we advocated.

Perhaps because they are on such unsure ground in relying on claimed inconsistency with our mandate, petitioners next argue that the district court's holding conflicts with various cases that have recognized that "expedition of discovery and the avoidance of undue burden and expense are sufficient justifications for the entry of protective order provisions like paragraph 2." Petitioners' Brief at 22. We question whether, absent inconsistency with our mandate, this contention is appropriately considered in support of a mandamus petition. Assuming *arguendo* that it is, the contention is without merit. In support, petitioners string cite five cases which in fact do not stand for such a proposition. *In re Consumers Power Co. Securities Litigation*, 109 F.R.D. 45 (E.D. Mich. 1985), involved a protective order entered by the court on stipulation of the attorneys which was challenged by a non-party newspaper. Applying a first amendment analysis, the court upheld the validity of the order

vis-a-vis the non-party. *Chambers Development Co. v. Browning-Ferris Industries*, 104 F.R.D. 133 (W.D. Pa. 1985), a memorandum opinion outlining the terms of a protective order, merely states that the defendants established good cause under Rule 26(c) but does not discuss how they did so. *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582 (E.D.N.Y. 1983), did not reach the issue of good cause. Rather, a media non-party who had filed a motion to obtain access to non-confidential documents produced by the government was held not to have standing where the party itself had agreed to the order and did not itself assert its right to disseminate discovery documents. *In re Korean Airlines Disaster*, 597 F. Supp. 621 (D.D.C. 1984), involved the same facts as the Agent Orange case – a consensual protective order which was later challenged by a non-party newspaper – and did not discuss good cause for entry of a protective order. Similarly, *Quinter v. Volkswagen of America*, 676 F.2d 969 (3d Cir. 1982), did not address the issue of good cause but rather involved whether the protective order concerning trade secrets applied to plaintiff's expert witness and whether the witness had violated the order. Thus, Judge Sarokin's holding is not contrary to any law to which we have been referred. We note also that the district court did not attack the appropriateness of protective orders in general as promoting the efficient management of cases. In fact, Judge Sarokin upheld most provisions of the magistrate's order. He simply vacated certain of its overbroad provisions.

The petitioners further argue that the district court's conclusion that courts may not enter protective orders without a specific showing of injury to a specific individual is clear error because 1) it ignores the court's inherent equitable power over its own process, and 2) it is an overly restrictive reading of Rule 26(c). Citing to *International Products Corp. v. Koons*. 325 F.2d 403 (2d Cir. 1963), in which Judge Friendly held that courts, under their inherent equitable power to control their own process, may enter protective orders against the dissemination of discovery materials, the petitioners urge that, because the district court here did not choose to exercise its inherent equitable power, it committed "clear error." This argument is without merit. Courts are not required to exercise their inherent

equitable powers where there are applicable procedural rules. The district court here complied with the mandate of this court to look for a specific showing of need for protection, while performing a Rule 26(c) analysis. The magistrate did not purport to exercise inherent equitable power.

In addition, petitioners urge that it would be unfair to change the protective order because they relied on it in producing documents up to that point. In support, they cite *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, 18 Fed. R. Serv.2d 1251, 1252 (N.D. Cal. 1974), which found that changing a protective order when the parties have relied on it is a "breach of faith," and to other cases in which courts have refused to vacate protective orders when parties have justifiably relied on them. *See, e.g., Martindell v. IT&T Corp.*, 594 F.2d 291, 296 (2d Cir. 1979); *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976); *Tavoulareas v. Washington Post Co.*, III F.R.D. 653, 658 (D.D.C. 1986); *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 106 F.R.D. 551, 555 (S.D.N.Y. 1985); *Data Digests, Inc. v. Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D.N.Y.1972).

While this argument at first blush has appeal, these cases are persuasive only if, in producing documents, the petitioners justifiably relied on the protective order. As Cipollone correctly points out, however, hundreds of thousands of documents were produced in the instant case *before* the magistrate's protective order of March 25, 1985. After a long discovery dispute, on May 2, 1984, Magistrate Cowen issued a discovery order allowing plaintiffs narrow discovery. So far as the record discloses, prior to that no discussions or negotiations had taken place regarding a protective order. Subsequently, petitioners approached Cipollone about a protective order. Cipollone agreed that truly confidential documents should not be disclosed but never agreed to a broad sweeping umbrella protective order including non-confidential documents or to limiting the use of the documents in other cases. Apparently, Cipollone agreed temporarily not to disseminate any documents "until [they] had an opportunity to attempt to agree upon a Protective Order regarding the documents or, if that [was] not possible to make a

request for such a Protective Order to the Court." Letters between counsel dated May 3 and 4, 1984. Thus, reliance cannot be justifiably based on this interim agreement. Further, once the protective order was issued over Cipollone's objection, an appeal by Cipollone was filed within 10 days. *See* Notice of Motion to Vacate Magistrate's Protective Order filed April 4, 1985. Clearly respondent never agreed with the protective order and no order was in place when most of the documents were produced. Thus, reliance under these facts cannot fairly be found, and was properly rejected.

Finally, petitioners quarrel with Judge Sarokin's application of Rule 1, maintaining that he inconsistently applied the rule in two different parts of his opinion. Again, petitioners' argument is without merit. The district court observed that the Rule 1 consideration that federal rules "be construed to secure the just, speedy and inexpensive determination of every action," Fed. R. Civ. P. 1, militates against limiting the use of discovery material in other litigation. *See Cipollone*, 113 F.R.D. at 91. Later in the opinion, Judge Sarokin ruled that the magistrate's limitation on the use of documents, apparently pursuant to Rule 1, was inconsistent with the good cause requirement of Fed. R. Civ. P. 26(c). He reasoned that "Rule 26(c), understood as a piece of a larger framework, reflects a policy decision that the 'just, speedy and inexpensive' determination of actions is best furthered by permitting the entry of protective orders only to prevent injury to individuals." *Cipollone*, 113 F.R.D. at 92-93. There is nothing inconsistent in the court's analysis.

C. *Evidence of Potential Financial Harm*

The petitioners contend that the district court erred in concluding that their submissions on potential financial harm were inadequate. They believe that the magistrate's protective order should have been upheld on this basis. This court, in issuing our writ of mandamus, instructed the district court that to show good cause "a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position." *Cipollone*, 785 F.2d at 1121. We also stated

that "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Cipollone*, 785 F.2d at 1121.

According to the petitioners, they submitted the following proofs:

> (1) that counsel for plaintiffs intended to disseminate to the general public selected portions of the material received by them in discovery;
>
> (2) that counsel for plaintiffs intended to accompany such dissemination with slanted "explanations" of the significance of particular documents;
>
> (3) that counsel for plaintiffs have regularly attended and participated in symposia and seminars concerning the smoking and health litigation, including those sponsored by securities analysts;
>
> (4) that securities analysts closely follow the smoking and health litigation, and have rendered opinions and issued investment advice, including a decision to downgrade their investment opinions concerning tobacco stocks such as those of defendants Reynolds and Philip Morris, based directly upon developments in this litigation;
>
> (5) that major institutional investors in tobacco stocks independently monitor such developments and make decisions to invest in or disinvest of tobacco stocks, including stocks of defendant R. J. Reynolds, based upon these developments;
>
> (6) that the market in tobacco company stocks has been sensitive to developments in this litigation;
>
> (7) a market analysis distributed by the investment firm of Drexel Burnham Lambert which referred to the "obvious volatility" of tobacco stocks in relation to events arising out of the smoking and health litigation;

> (8) evidence that the firm of E.F. Hutton has noted that the viability of tobacco stocks was "directly related" to product liability litigation.

Petitioners contend that Judge Sarokin mischaracterized and ignored their submissions. He did not. Rather, he made a careful analysis of petitioners' submissions concerning potential financial harm. *See Cipollone*, 113 F.R.D. at 89-91. He considered the contention that the market price of defendants' stock will be adversely affected but found that "[s]uch a sweeping allegation" does not rise to the level of specificity required by Rule 26(c). *See Cipollone*, 113 F.R.D. at 90. Noting the "only specific 'example' cited by defendants"—"that Philip Morris stock increased in value ten points after the Third Circuit's issuance of their writ of mandamus"—the court found that the petitioners here, unlike the petitioners in *Tavoulareas*,[2] never specifically demonstrated how dissemination would hurt their business. *See Cipollone*, 113 F.R.D. at 90. Failing to provide the district court with a single document as a concrete example of the type of harm they would suffer, petitioners made only broad allegations of harm. Although the petitioners claim that "[t]he district court's opinion indicates that nothing will do but a showing, document-by-document and deposition-by-deposition, that each, separately released, would in fact cause a fall in the market for defendants' securities," Petitioners' Brief at 31, there is nothing in the opinion which substantiates such a proposition. The district court stated:

> Defendants have shown that their financial standing has been affected by this and related litigation. Defendants have not substantiated, however, how preventing the release of all discovery materials is needed

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[2] In Tavoulareas v. Washington Post Co., III F.R.D. 653 (D.D.C. 1986), Mobil Oil Co. produced certain documents concerning business arrangements in the Middle East and argued that disclosure of those documents might interfere with its business dealings in Saudi Arabia. Mobil reviewed specific documents and provided the court with concrete examples of how their disclosure would harm its business operations.

> to prevent particularized, significant injury to their financial and competitive position. Defendants have not identified a single document which they contend will or might have such an effect.

*Id.* Obviously, the district court did not require a document-by-document showing. It was merely looking for concrete examples.[3]

## IV.-
## Remand to a Magistrate

We note that the petitioners did not assert in the district court, or in the petition here, that our mandate required the district court to do anything more than reconsider the previous ruling in light of the two legal errors which this court found. Indeed, the district court undertook exactly such a reconsideration and so it is not surprising that the petitioners have not urged either a new hearing or new factfinding. We find no basis, therefore, in the petition or in the representations made by petitioners for considering a contention that the district court should have permitted either the creation of a new record or a new opportunity for factfinding by a different magistrate.

## V.
## Reassignment

Petitioners contend that the case should be reassigned to a different judge because of Judge Sarokin's bias, which, they insist, is demonstrated because: 1) he did not follow our prior

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[3] Solely in connection with III C, Judge Seitz would note that the writ of mandamus issued by this court in *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986), required the district court to adhere to the "good cause" standard in Fed R. Civ. P. 26(c) as there interpreted. Considering our necessarily amorphous direction with respect to the duty of the district court, Judge Seitz is satisfied that the district court fairly attempted to comply. Under these circumstances, he believes that it is not our function in this mandamus context to inquire further.

mandate; 2) his rulings indicate hostility to the tobacco industry; and 3) he has prejudged critical factual disputes. Each of these bases for suggesting bias lacks merit.

As we conclude in Part III above, Judge Sarokin did follow our mandate. Additionally, even if he had not, that alone, despite the petitioners' insistence to the contrary, is not a sufficient basis to remand to a different district court judge. It does not establish bias. In this area, we may take instruction from cases arising under 28 U.S.C. § 144 (1982), and its predecessor, section 21 of the Judicial Code (1911), ch. 231, § 21, 36 Stat. 1087, 1090 (1911). *See Berger v. United States*, 255 U.S. 22, 31 (1921) ("bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case" and the disqualification statute "was never intended . . . to enable a discontented litigant to oust a judge because of adverse rulings"); *accord Hanger v. United States*, 398 F.2d 91, 101 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969).

In support of their contention that Judge Sarokin's ruling demonstrates hostility to the tobacco industry, petitioners point to the district court's first decision on the protective order, in which the court entered an order requiring petitioners to file briefs with the magistrate to justify the claim of confidentiality for each document so designated. This, they correctly state, was more relief than Cipollone requested. That order, however, has been rescinded and the district court's modified protective order is in compliance with our mandate. An error of law, corrected by a reviewing court, does not establish bias.

Finally, the petitioners accuse Judge Sarokin of prejudging critical fact issues that have not been yet heard. These issues are: "(1) whether consumers have been adequately informed of the dangers of smoking; (2) whether smokers are properly viewed as 'victims' of their smoking; and (3) whether cigarettes are addicting." Petitioners' Brief at 46-47. In support, petitioners quote various sentences in 649 F. Supp. 664 (D.N.J. 1986), 593 F. Supp. 1146 (D.N.J. 1984) and slip op. (D.N.J. Dec. 7, 1984), which, they say, show that the district court has already decided these issues. *See* Petitioners' Brief at 47-56. All

are taken out of context and exaggerated. They are not worth setting forth here.

The petition that we remove Judge Sarokin from the case by exercising our authority under 28 U.S.C. § 1651 to protect petitioners from bias is entirely without merit, and a thinly disguised effort at judge shopping.

## VI.
## Conclusion

The district court on remand following the previous decision in this case complied in good faith with our mandate. The court committed no clear error of law in modifying the magistrate's protective order. The petitioners' suggestion of bias is entirely without merit. The petition for mandamus will therefore be denied.

GARTH, *Circuit Judge, dissenting:*

My quarrel with the majority opinion stems from the majority's failure to recognize that the district court did not comply with the mandate we prescribed in our first review of this issue. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986). As I understand our mandate, we directed the district court to review the magistrate's good cause determination under the clearly erroneous and contrary to law standard prescribed by 28 U.S.C. § 636(b)(1)(A). Instead, the district court, when faced with this directive and a record barren of any facts found by the magistrate, redrew the protective order with no regard to our remand for further factfinding.

After concluding that the district court had reviewed the magistrate's original decision under an erroneous standard of review, the prior panel of this court set out its mandate. That panel, noting that "no specific good cause findings have been made," *Cipollone*, 785 F.2d at 1120, directed the district court to "take second looks at the good cause issue. . . and at the magistrate's protective order." *Id.* Moreover, the panel observed that a court of appeals review of the order would be "unwise." *Id.* Such a review would entail "detailed consideration of the

defendants' assertion of good cause," and therefore would be "exceedingly difficult" without a remand to the district court for its reconsideration under appropriate standards. *Id.* The panel then predicted that the district court's "good cause hearing will likely reveal the appropriate shape that the protective order should take and it is thus better that any delineation of specifics await that hearing."*Id.*

To comply with that instruction, Judge Sarokin should have reviewed the magistrate's opinion and order using the "clearly erroneous and contrary to law" standard prescribed by 28 U.S.C. § 636(b)(1)(A). As explained in the statute's legislative history, the magistrate's "determination set forth in an appropriate order shall be 'final' subject only to the ultimate right of review by a judge of the [district] court." *See* H.R. Report No. 1609, 94th Cong., 2nd Sess. 9-11, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6162, 6170. Therefore, a district court judge first would determine whether the facts found by the magistrate to support the good cause determination were clearly erroneous and whether the conclusions of law supporting the finding were contrary to law. If the district court held that facts found by the magistrate were clearly erroneous or that conclusions of law were incorrect, then the district court must reconsider the magistrate's decision.[1]

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[1] The legislative history for 28 U.S.C. § 636(b)(A)(1) sets out the circumstances in which a judge "may reconsider" the matter before the magistrate:

> Use of the words "may reconsider" in subparagraph (A) is intended to convey the congressional intent that a matter "heard and determined" by the magistrate need not in every instance be heard a second time by the judge. However, if a party requests reconsideration based upon a showing that the magistrate's order is clearly erroneous or contrary to law then the judge must reconsider the matter. Of course, the judge has the inherent power to rehear or reconsider a matter *sua sponte*.

*See* H.R. Report No. 1609, 94th Cong., 2nd Sess. 9-11, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6162, 6170.

Unfortunately, in this case, the magistrate failed to make specific findings on the good cause "issue," and thus the district court, while told to review good cause findings, was faced with no findings to review. Indeed, the district court itself observed that "[t]he magistrate's protective order did not contain specific written findings that good cause existed for prohibiting plaintiffs either from disseminating the fruits of nonconfidential discovery to the public or from utilizing discovery in other litigation." *Cipollone v. Liggett Group*, 113 F.R.D. 86, 89 (D.N.J. 1986).

Yet, although our court's mandate required that specific written findings be made, the district court did not remand the issue to the magistrate for factfinding, nor did it perform such factfinding itself. Rather, the district court took it upon itself to formulate and examine five separate "arguments"[2] to determine whether the "arguments" were "clearly erroneous or contrary to law." As if in anticipation of my concern, the district court protested that it "[did] not attempt to identify the grounds upon which the magistrate's general finding of good cause was based," but only "analyze[d] whether any of these arguments could support the magistrate's finding." *Id.* at 89 n.2.

Following this "review" of the magistrate's order, the district court held, in part, that "[t]o the extent that the magistrate found good cause based upon embarrassment to defendants, the effect of dissemination [of discovery to the press and third parties] on the fairness of trial, or the prior conduct of plaintiffs' attorney, the finding is clearly erroneous." *Id.* at 93. The district court also held that "[t]o the extent that the magistrate found

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[2] The district court identified "upon analysis of the order itself, the transcript of the proceedings before the magistrate, and defendants' briefs and oral arguments . . . five specific arguments for 'good cause' under Rule 26(c): 1) that defendants will suffer financial and other embarrassment; 2) that fairness at trial will be compromised; 3) that plaintiffs are estopped from disseminating this material by a prior agreement of plaintiffs' counsel; 4) that discovery in this case will be facilitated; 5) that dissemination constitutes an abuse of the discovery process." Cipollone v. Liggett Group, Inc., 113 F.R.D. 86, 89 (D.N.J. 1986).

good cause based upon a desire to facilitate discovery or to prevent an abuse of the discovery process, the finding is contrary to law." *Id.* In effect, without the benefit of any findings of fact, the district court constructed and then "reviewed" three of the five arguments, all of which required factual support. The arguments so reviewed were: the possibility of embarrassment to the defendant cigarette companies, the possibility of financial harm due to the pretrial dissemination of discovery materials, and a claim of estoppel based upon the conduct of plaintiffs' attorney. It was on this basis that the district court concluded that good cause had not been demonstrated: a conclusion reached without the review of, or the finding of, a single fact.

At no point does the majority opinion claim that findings of fact appear in the record. Indeed, while the majority opinion notes that the magistrate made no findings, it curiously fails to mention that the district court's decision and order is similarly flawed. Characterizing the district court's opinion as a review of "five specific arguments" is no substitute for the absence of findings at both the district court and magisterial level.

As a reviewing court we must be sensitive to the factfinding functions of the courts we review, and to this date no findings on the issue of good cause have ever been made. The district court should have ensured that findings were made, not only to comport with the review process envisioned by 28 U.S.C. § 636(b)(1)(A), but also to obey the mandate handed down by the prior panel of this court.

My decision that the writ should issue to enforce our mandate is compelled by the fact that this panel is bound by the earlier mandate, just as Judge Sarokin was bound. *See Taylor v. United States*, 815 F.2d 249, 252 (3d Cir. 1987)("It is well-established that a district court must adhere to the mandate"); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985)("It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed in accordance with the mandate"). The district court, by refusing to remand for factfinding or by failing to find the

essential facts itself, did not satisfy the mandate of our court. Nothing that appears in the majority opinion excuses that failure. Because no compliance was had without mandate I would issue the writ of mandamus.

While I of course agree with the majority's disposition of the reassignment request, I am obliged to dissent from the majority's disposition for the reason I have set out above.

**Opinion of the District Court**
**dated November 12, 1986**

ANTONIO CIPOLLONE,
Individually and as Executor of the
Estate of Rose D. Cipollone,

Plaintiff,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES INC.,

Defendants.

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SUSAN HAINES, as
Administratrix ad Prosequendum and
Executrix of the Estate of Peter F. Rossi,

Plaintiff,

—v.—

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R.J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants.

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Nos. 83-2864 and 84-678

United States District Court,
District of New Jersey
Decided November 12, 1986

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SAROKIN, District Judge

This matter is now before the court pursuant to defendants' receipt of a writ of mandamus from the Third Circuit. Specifically, the Third Circuit's opinion directed this court to (1) reconsider

its prior decision reversing various aspects of a magistrate's protective order in light of the "good cause" standard of Rule 26(c) of the Federal Rules of Civil Procedure, and (2) to reconsider its reversal of that aspect of the magistrate's protective order which permits the party seeking protection from dissemination to designate documents confidential without first establishing good cause to do so on a document-by-document basis. The court proceeds to do so.

The order heretofore entered in this matter prohibited *all* discovery of defendants from being disclosed either to the public in general or plaintiffs in other similar litigation. Before defendants are entitled to such a protective order they are required to establish that there is "good cause" for its entry and continuance.

The general focus of discovery in this matter has been the knowledge of the defendant tobacco companies regarding the risks of cigarette smoking and what action was taken to conceal or minimize these risks and neutralize the required warnings.

The Third Circuit has made it clear that first amendment considerations are not implicated in this analysis. It is thus this court's duty to abide by that mandate. However, the court expresses its concern if the public interest is eliminated as a factor in determining whether discovery should be protected from disclosure.

Discovery may well reveal that a product is defective and its continued use dangerous to the consuming public. The public disclosure of that information will certainly embarrass that party and cause it financial loss. It is inconceivable to this court that under such circumstances the public interest is not a vital factor to be considered in determining whether to further conceal that information and whether a court should be a party to that concealment.

However, even ignoring the public interest, defendants have failed to demonstrate any good cause for the concealment of otherwise non-confidential materials from the public in general. Defendants' arguments are even less persuasive with respect to related litigation. By requiring each plaintiff in every similar action to run the same gauntlet over and over again serves no

useful purpose other than to create barriers and discourage litigation against the defendants. Good cause as contemplated under Rule 26 was never intended to make other litigation more difficult, costly and less efficient.

## BACKGROUND

The protective order at issue here was entered on March 25, 1985 by the Honorable Robert E. Cowen, United States Magistrate. As noted by this court in its prior opinion in this matter, the order limits the extent to which one party may disclose certain confidential information made available by its opponents during discovery proceedings. Specifically, the order provides that "[a]ll information produced or exchanged in the course of this civil action or any appeal arising therefrom . . . shall be used solely for the purpose of this case," (para. 2), and shall be returned or destroyed after trial. (para. 13.) More complex limitations are imposed upon "confidential information". If a party has a "good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure," (para. 3) it may label such information accordingly, and it is then to be filed, or otherwise utilized, under seal (para. 11-12).

Once labelled, confidential information is, under the order, open for inspection only by counsel or their associates or employees (para. 6(a)), or by experts retained for the purposes of the litigation (para. 6(b)), but the latter are required to sign an oath attesting to their understanding that they are bound by the terms of the order (para. 7). In the event of any disclosure, counsel and the court, shall be advised, in writing, of the name, address and occupation of the person to whom counsel propose to disclose, for the purposes of this litigation, said confidential information. *Id.* Additional protections or other modifications of the order may also be sought.

Plaintiffs appealed this order, arguing that it constituted an abuse of discretion and a violation of both the first amendment and of basic discovery principles. By opinion dated July 17, 1986, this court found merit in a number of plaintiff's contentions,

concluding (1) that the court should engage in a de *novo* standard of review because first amendment rights were implicated by the protective order; (2) that according to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984), protective orders such as the one here at issue limit first amendment freedoms unless they are no broader than necessary to protect the governmental interests furthered by Rule 26(c), *see Procunier v. Martinez*, 416 U.S. 396, 413 ("First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."); (3) that the order violated Rule 26(c) and also the first amendment by shifting the burden with regard to confidentiality designations from the party desiring such designation to the protesting party; (4) that the order improperly restricted the use of non-confidential discovered materials to use in this case; and (5) that the order likewise improperly prohibited plaintiffs' attorneys from using confidential material in other litigation in which they are participants. *Cipollone v. Liggett Group*, 106 F.R.D. 573 (D.N.J. 1985).

Defendants appealed, and in the alternative sought mandamus. The Third Circuit found this court's order to be non-appealable, *Cipollone v. Liggett Group*, 765 F.2d 1108, 1117 (3d Cir. 1986), but concluded that it did have mandamus jurisdiction pursuant to 28 U.S.C. §1651, because the matter at issue involved the disclosure of confidential materials, 765 F.2d at 1118. The Third Circuit thereupon determined that this court had erred in two ways. First, it had misread *Seattle Times* when it concluded that an order prohibiting the disclosure of information obtained under the discovery rules violates the first amendment unless it meets the "least restrictive means" test. Rather the Third Circuit explained, the Supreme Court's first amendment language in *Seattle Times* was mere *dictum*, and as such was outweighed by those portions of the opinion that emphasized that the discovery process is not a forum traditionally open to the public, and that held that "a protective order . . . entered

on a showing of good cause does not offend the First Amendment." 467 U.S. at 37; *see New York v. United States Metal Refining Co.*, 771 F.2d 796, 802 (3d Cir. 1985). The Third Circuit then stated as follows:

> We may summarize thus. *Seattle Times* required the district court merely to inquire whether the defendants had demonstrated good cause for the protective order; the district court instead applied a least restrictive means test. The good cause standard is significantly less demanding than the least restrictive means test; the court's error, therefore, may have worked a serious detriment to the defendants.

Second, the Third Circuit determined that this court had improperly exercised *de novo* review, as such review was premised on the perceived constitutional question at issue, which issue did not actually exist under a proper reading of *Seattle Times*. This court was therefore instructed on remand to review the magistrate's order to determine whether it is "clearly erroneous or contrary to law," 28 U.S.C. § 636(b)(1)(A), particularly with regard to whether that order was based on a sufficient showing of "good cause." The Third Circuit added that this court had erred in concluding that Rule 26(c) obliged it to require defendants to show good cause for protected status on a document-by-document basis, as an umbrella order is appropriate for complex litigation such as this. Having been so instructed, the court turns once again to the task of evaluating the appropriateness of the magistrate's protective order.

## DISCUSSION

### I. *The Question of Good Cause*

Plaintiffs contend that Paragraph 2 of the protective order, limiting use of non-confidential discovery materials to litigation in this case,[1] is not supported by "good cause" as required under Rule 26(c).

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[1] Paragraph 2 applies to all discovery materials. Plaintiffs do not challenge the paragraph's limitation as it applies to "confidential" material.

Rule 26(c) states:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

The Third Circuit opinion above explicitly guides the court in its application of this language to the case at hand. The opinion stressed that defendants have the burden of "demonstrating a particular need for protection." *Cipollone v. Liggett Group, Inc.*, 785 F. 2d 1108, 1121 (3d Cir. 1986). The opinion counseled, "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c] test . . . . Moreover, the harm must be significant, not a mere trifle." *Id.* The Third Circuit, as an example of an argument that failed to establish good cause, cited a Second Circuit opinion finding insufficient to support a protective order the party's broad allegations that disclosure would injure them in the industry and community. *Id.*, citing *Joy v. North*, 692 F. 2d 880, 894 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983). The Third Circuit summarized as follows:

> We add to the district court's comments only our own understanding that, because release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment is particularly serious. As embarrassment is usually thought of as nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground . . . . [T]o succeed, a business will have to show with some specificity that

> the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.

*Id.*

The magistrate's protective order did not contain specific written findings that good cause existed for prohibiting plaintiffs either from disseminating the fruits of non-confidential discovery to the public or from utilizing discovery in other litigation. The court, upon analysis of the order itself, the transcript of the proceedings before the magistrate, and defendants' briefs and oral arguments, identifies five specific arguments for "good cause" under Rule 26(c): 1) that defendants will suffer financial and other embarrassment; 2) that fairness at trial will be compromised; 3) that plaintiffs are estopped from disseminating this material by a prior agreement of plaintiffs' counsel; 4) that discovery in this case will be facilitated; 5) that dissemination constitutes an abuse of the discovery process. The court examines whether any of these arguments constitutes "good cause" for limiting use of discovery solely to this case.[2]

*(1) Financial and other embarrassment*

The order signed by Judge Cowen, submitted by defendants, contained the following general language in its preamble:

> And it further appearing that the confidential business records and private information of the parties should be given the protection of an order of this Court to prevent injury to and invasion of the confidential property of the parties by reason of any disclosure not otherwise necessitated by the parties' lawful interests in this litigation only, and good cause appearing . . .

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[2] The court does not attempt to identify the grounds upon which the magistrate's general finding of good cause was based. The court analyzes whether any of these arguments could support the magistrate's finding.

The order does not specify or elaborate on the "injury" which the order is designed to prevent. Defendants, in their brief, elaborate on the nature of this "injury."

> The likelihood of financial and other forms of embarrassment from dissemination was obvious when the protective orders were entered, and they remain so . . . . This litigation, which has been closely followed by the financial community and the press, has resulted in wide gyrations in the values of the defendants' stock, and plaintiffs' counsel have met with investment advisers to discuss this litigation in an attempt to affect the market price of the defendants' stock.

Defendants' Memorandum of Law in Support of Protective Order of March 25, 1985, at 12.

In essence, defendants now argue that if the truth be known and discovery disclosed it might prove embarrassing and affect the market price of defendants' stock. Such a sweeping allegation, however, does not reach the level of specificity that the Third Circuit has emphasized is required by Rule 26(c). Defendants have shown that their financial standing has been affected by this and related litigation. Defendants have not substantiated, however, how preventing the release of all discovery materials is needed to prevent particularized, significant injury to their financial and competitive position. Defendants have not identified a single document which they contend will or might have such an effect.

The inadequacy of defendant's showing is illustrated by contrasting a recent case in which a corporation made a sufficiently particularized showing to justify a finding of "good cause" to retain a protective order. *See Tavoulareas v. Washington Post Co.*, slip op., Nos. 80-3032, 80-2387 (D.D.C. Aug. 11, 1986). In *Tavoulareas*, Mobil Corporation presented a statement explaining how release of discovered materials would significantly impair specific business relationships of Mobil in Saudi Arabia.

The evidence presented explained how release of these documents would destroy the confidentiality necessary to maintain those ongoing relationships. The court found this to be a sufficient showing under Rule 26(c) both to justify the initial entry of the order and to justify the order's retention after litigation.

Defendants, in contrast, allege only that release of discovery materials will cause their general business standing to decline. The only specific "example" cited by defendants is the fact that Philip Morris stock increased in value ten points after the Third Circuit's issuance of their writ of mandamus. Defendants' Memorandum, at 17; Defendants' Reply Memorandum, at 7. The probative value of this event is uncertain.[3] More fundamentally, this isolated incident does not constitute a showing of particularized and significant injury required by Rule 26(c). Defendants never identify specifically how dissemination will injure their business, as did Mobil in *Tavoulareas;* instead, defendants offer only the broad allegation that release will harm their overall standing. Rule 26(c), as made plain by the Third Circuit, requires more for a showing of good cause.

Defendants' arguments are even less persuasive with regard to limiting use of discovery material in other litigation. The causal chain behind their position is as follows. Defendant's financial and competitive position may be harmed by this type of litigation; prohibiting use of *Cipollone/Haines* discovery in other litigation makes such litigation more difficult to sustain; consequently, defendant will suffer significant injury if discovery is not confined to this litigation. Defendants' argument not only fails to substantiate a particularized and significant injury as required by Rule 26(c). The argument also runs counter to a fundamental purpose of discovery under the Federal Rules.

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[3] Defendants do not explain the surrounding market context of this rise; thus, the court cannot know if the Third Circuit's opinion was the critical or even an important factor in the price change. Additionally, defendants offer no evidence that stock prices fell due to this court's reversal of the entry of the order.

All of the Federal Rules are informed by the admonition of Rule 1 that they "be construed to secure the just, speedy, and inexpensive determination of every action." Acting consistent with this purpose, a number of courts have rejected requests to limit the use of discovery to the litigation in which it is initially obtained. Their reasoning is best summarized by the opinion of Judge Wisdom in *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980), which states that the presumption of open discovery

> should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for . . . access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process. Particularly in litigation of this magnitude, we, like the Multidistrict Panel, are impressed with the wastefulness of requiring the [collateral party] to duplicate discovery already made . . . . We therefore agree with the result reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.

*See Marcus, Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 41 (1983); *see also Cipollone v. Liggett Group, Inc.*, 106 F.R.D. at 585-586 (citing several cases standing for this proposition). Here, defendants' showings simply do not establish that substantial rights will be so tangibly prejudiced that injustice will result unless the discovery obtained in this litigation is limited to it. Indeed, no direct purpose can be discerned from their position except to discourage future identical actions against them by maintaining the costliness of the discovery involved to other plaintiffs. As noted by this court in its previous opinion herein,

> The court cannot ignore the might and power of the tobacco industry and its ability to resist the individual claims asserted against it and its individual members. There may be some claimants who do not have the resources or such able and dedicated counsel as in this case to pursue the thorough investigation which these cases require. To require that each and every plaintiff go through the identical long and expensive process would be ludicrous. Even from the point of view of the defendants (though they resist), it would seem that they would benefit by avoiding repetition of the same discovery in each and every case." *Cipollone*, 106 F.R.D. at 577.

So long as the initial litigation has not itself been instituted in bad faith for the purpose of obtaining documents for other actions, and so long as the interests of those represented in the initial litigation are being fully and ethically prosecuted, the Federal Rules do not foreclose the collaborative use of discovery. *See American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973).

Defendants expressed concern at oral argument that each court should have the right to control discovery in the particular matter before it, and that making the discovery in this matter available in others will defeat that control. That concern is susceptible to easy resolution. Any plaintiff seeking to utilize the discovery in this matter for his or her own purposes shall be required to seek leave of the court before whom the matter is pending. That court can resolve any objections based upon relevance or otherwise.

Defendants have not made a showing that they will suffer "embarrassment" or injury sufficient to support the magistrate's finding of good cause under Rule 26(c).

*(2) Fairness at trial*

Defendants in their brief on this motion assert that the good cause supporting the order lies also in the preservation of a fair

trial. Defendants claim that "extra-judicial use of the documents covered by the protective order could affect the fairness of the trials themselves, and would be in conflict with the purpose of discovery." Defendants' Memorandum, at 12. At oral argument, counsel for defendants referred to news coverage, including a *New York Times* article in which plaintiffs' counsel was quoted. Transcript of Proceedings, September 25, 1986, at 25. According to defendants' counsel, plaintiffs' counsel inaccurately characterized certain documents to the prejudice of defendants. *Id.* Defendants argue that "one has to assume that the judge was aware of these facts and took them into account when he decided to enter this order." *Id.* at 26.[4]

The court is satisfied that appropriate precautions can be taken in the jury selection process to guard against the possibility that the publication of such material might affect the outcome of the trial. This argument does not support the magistrate's finding of good cause.

*(3) Estoppel*

Defendants, in their brief, claim that they initially agreed to comply with broad discovery requests on plaintiffs' assurances that the discovered documents would be used only for this litigation, and that it would be "grossly inequitable" for these documents to be "let loose for the purposes of harming the defendants." Defendants' Memorandum, at 12.

The court finds the claim to be totally without support. The agreement which plaintiff's counsel reached was one made pending entry of a protective order and was scrupulously honored by a plaintiffs' counsel. Therefore, restriction on the use of discovery materials as to this litigation only cannot be predicated upon any agreement or representation by plaintiff's counsel.

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[4] The magistrate stated at the proceeding, however, that he read nothing in the *New York Times* article that was "improper at all." Transcript of Proceedings, March 25, 1985, at 39.

*(4) Facilitation of discovery in this case*

The magistrate, at the March 25, 1985 hearing at which he issued the protective order, explained the rationale behind his decision.

> [T]he Court has decided that I'm going to go with the protective order that has been propounded -- proposed by the defendant Reynolds in both the Haines and Cipollone case. In the event this decision is appealed or reviewed by higher authority, I want the record to reflect that it's my opinion, it's my judgment that having this order in place will facilitate the efficacious production of documents and discovery of the defendants to some extent and that it will streamline the litigation to the point where the discovery sought and had in this case will be for this case and this case alone, and that at the time this case is tried that, of course, anything that goes into the record at that time will be a public matter and public information.

Transcript of Proceedings, March 25, 1985, at 56. Thus, in the magistrate's own words, the good cause behind the order was his belief that the order would "facilitate" and "streamline" the litigation.

The magistrate's reasoning, though based on commendable motives, misconstrues the nature of the "good cause" requirement of Rule 26(c). The magistrate apparently felt that limiting the use of discovery to this case alone would "secure the just, speedy and inexpensive determination" of this action, consistent with the intent expressed in Rule 1 of the Federal Rules. Rule 26(c), however, does not empower individual courts to make such policy decisions. The Rule allows a court to "protect a party or person" -- the focus is on injury to a specific individual, not on general concerns of case administration. Rule 26(c), understood as a piece of a larger framework, reflects a policy decision that the "just, speedy and inexpensive" determination of actions is best furthered by permitting the entry of protective orders only to prevent injury to individuals.

The Third Circuit explanation of "good cause" recognizes that the Rule 26(c) inquiry must focus on the harm defendants will allegedly suffer from dissemination of discovery material. The Third Circuit directed this court to test defendants' allegations of harm against the legal standards they provided. Nowhere in the Third Circuit's directive is this court told that the "good cause" supporting a protective order may be general concerns of trial administration.

The magistrate's rationale that entry of the protective order would facilitate and streamline this litigation is not sufficient "good cause" under Rule 26(c).

*(5) Abuse of the discovery process*

Defendants' counsel at oral argument contended that good cause may be established by a showing that a protective order is needed "to prevent an abuse of the discovery process." *Id.* at 20. Defendants' counsel explains that the sole purpose of the discovery process is to help the parties prepare for litigation. Anything that goes beyond that constitutes an abuse of the discovery process . . . ." *Id.* Because dissemination to the public and use in other litigation goes beyond the "sole purpose" of discovery, the magistrate had "good cause" to enter this order to protect from that abuse."[5]

This argument, like that concerning facilitation of discovery, ignores the language and misconstrues the purpose of Rule 26(c). The Supreme Court has stated that Rule 26(c) protective orders are designed to prevent abuse of discovery, but abuse in the sense of causing injury to particular individuals.

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[5] The magistrates' order contains no specific finding that plaintiffs' proposed use is an abuse of the discovery process. Furthermore, Judge Cowen's remarks at the proceeding contain no such reference. Defendant's counsel suggests, though, that "we have to assume" that Judge Cowen had the fundamental principles of discovery in mind when he entered the order.

> There is an opportunity, therefore, for litigants to obtain -- incidentally or purposefully -- information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.

*Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984). Again, the Third Circuit's discussion of "good cause" shows that protection from injury to individuals must be the focus of a Rule 26(c) protective order. Thus, the mere fact that plaintiffs intend to use these materials outside of this litigation is not "good cause" to support the protective order, unless defendants can establish that the discovery was not procured in good faith for the purposes of this litigation. No such showing is made or claimed. Absent a showing that plaintiff's use will sufficiently injure the defendants, the magistrate had no good cause to limit use of the discovery to this case alone.

In summary, the magistrate's finding that defendants had shown good cause to support an order that nonconfidential discovery "shall be used solely for the purpose of this case" is clearly erroneous and contrary to law. To the extent that the magistrate found good cause based on embarrassment to defendants, the effect of dissemination on the fairness of trial, or the prior conduct of plaintiffs' attorney, the finding is clearly erroneous. To the extent that the magistrate found good cause based on a desire to facilitate discovery or to prevent an abuse of the discovery process, the finding is contrary to law.

II. *The Propriety of an Umbrella Order*

Finally, the Court of Appeals pointed out that this court reasoned improperly when it vacated that aspect of the magistrate's order that permitted defendants to designate documents "confidential," with plaintiffs bearing the responsibility of contesting such designation. 765 F.2d at 1122.

This court expressed its concern then and repeats it now. The wholesale designation of confidentiality by defendants places

an undue and unnecessary burden upon plaintiff. The potential of an ultimate award of sanctions does not relieve plaintiff's counsel of the need to expend time and money in the first instance to set aside that designation. The fact that they may be ultimately reimbursed after the expenditure of further time and money seeking such reimbursement is insufficient and fails to recognize the inequality of the parties before the court in reference to their economic positions and their relative abilities to pursue or resist discovery.

According to the Third Circuit, this court erred when it concluded that such order shifted the burden of proof to plaintiffs in violation of Rule 26(c). Rather, the Third Circuit noted, it is appropriate and in keeping with the Manual for Complex Litigation to utilize an "umbrella order" for confidentiality designations, in which groups of documents may be marked confidential subject to the good faith requirement that defendants invoke such protection only for documents that are truly confidential. Having been so instructed, the court concludes that the magistrate's determination was not clearly erroneous or contrary to law in this regard, and therefore upholds the aspect of the magistrate's order that permits defendants to make an initial designation of confidentiality, subject to their determination that such designation is warranted in good faith, and subject to plaintiff's later opportunity to challenge such designation and request sanctions pursuant to Fed. R. Civ. P. 26(g).

CONCLUSION

The court abides by its previous reversal of Paragraph 2 of the magistrate's order as it applies to nonconfidential materials. The court orders that any other plaintiff seeking to utilize discovery from this matter comply with the procedures described in the opinion. The court abides by its previous modification of Paragraph 7 of the order. The court affirms the propriety of the "umbrella order" entered by the magistrate. The court directs plaintiffs' counsel to submit an appropriate order.

/S/ H. LEE SAROKIN

H. LEE SAROKIN, U.S.D.J.

**Opinion of the Court of Appeals**
**Dated March 12, 1986**

ANTONIO CIPOLLONE,
Individually and as the Executor of
the Estate of Rose D. Cipollone,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Petitioners,

—v.—

HONORABLE H. LEE SAROKIN,
United States District Judge,
District of New Jersey,

Nominal Respondent.

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SUSAN HAINES,
as Administratrix ad Prosequendum
and Executrix of the Estate of Peter F. Rossi,

Plaintiff-Respondent,

— v. —

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R.J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R.J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and LOEW'S CORPORATION,

Petitioners,

— v. —

HONORABLE H. LEE SAROKIN,
United States District Judge,
District of New Jersey,

Nominal Respondent.

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Nos. 85-3423, 85-3424, 85-5529
and 85-5530

United States Court of Appeals,
Third Circuit
Decided March 12, 1986

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## OPINION OF THE COURT

BECKER, Circuit Judge.

These appeals require us to apply the principles and case law pertaining to Fed.R.Civ.P. 26(c) to a claim that certain materials obtained in civil discovery but alleged by the producing party to be confidential may be disclosed by the discovering party to the public. We must also consider whether we have appellate jurisdiction over the district court's interlocutory order permitting disclosure of the materials.

The appeal arises from two of the several cases nationwide in which cigarette smokers or their personal representatives have instituted product liability suits against tobacco companies. In both cases, the parties had already engaged in extensive discovery, including production of a very large number of documents by defendants, when the defendants sought protective orders that would prevent the dissemination, either to the public or to counsel in other similar cases, of any documents they had produced or would produce during discovery.[1] A federal magistrate entered identical protective orders in both cases along the lines requested by the defendants.

On appeal from the magistrate's orders, the district court substantially revised them. The court altered the procedure that

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[1] Although the record is unclear on the point, it appears from representations made at oral argument that confidentiality was maintained during the initial phase of the litigation by tacit mutual understanding and that it was only when plaintiffs' counsel evinced an intention to use the material beyond the confines of the litigation that the protective order phase of the litigation began.

the magistrate's orders had established for deciding disputed claims of confidentiality, and restricted the orders' scope so that release of the documents to the press and public would have followed almost as of course but for this appeal. The revised orders also permitted the documents to be used in other cases in which plaintiffs' counsel was the counsel of record.

The defendants thereupon appealed to this Court and petitioned for mandamus, asserting that the revised orders violated Fed.R.Civ.P. 26(c) and reflected a skewed reading of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). The defendants also moved for an expedited appeal and a stay of the district court's orders, as well as reinstatement of the magistrate's orders pending appeal. We granted those motions. The plaintiffs moved to dismiss the appeals for want of appellate jurisdiction, and also moved to dismiss the petition for mandamus.

We hold that: (1) we do not have jurisdiction to review the order pursuant to the collateral order doctrine as enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); (2) we do have mandamus jurisdiction to review the order pursuant to 28 U.S.C. § 1651 (1982); (3) because the district court's reading of *Seattle Times* constituted a clear error of law, the ruling on the defendants' motion for protective orders was incorrect; and (4) the district court also clearly erred in relying on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) to exercise plenary review of the magistrate's protective order, for the court was bound to apply a "clearly erroneous" standard. We therefore grant the writ of mandamus. To assist the district court in future proceedings, we discuss two additional points relevant to this case: the definition of "good cause," and the administration of protective order proceedings.

## I. PROCEDURAL HISTORY

### A. *The Institution of the Suits*

Rose Cipollone and her husband Antonio filed a complaint against Liggett Group, Inc., Philip Morris, Inc., and Loew's Theaters, Inc., all manufacturers of cigarettes,[2] in the district court for the District of New Jersey on August 1, 1983. Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332 (1982). The complaint alleged that defendants manufactured or sold cigarettes and that Rose Cipollone had smoked defendants' cigarettes for almost forty years. As a result of her smoking, the complaint alleged, she acquired bronchogenic carcinoma and other personal injuries; it further alleged that she had experienced severe pain and suffering and that her illness had caused her – and would continue to cause her – great expense. Plaintiffs sought compensation for Rose Cipollone's injuries, suing under theories of negligence and strict liability. Central to plaintiffs' case was their allegation that defendants had withheld scientific evidence from the public and had misrepresented the effects upon health of smoking cigarettes. They also sought compensation for Antonio Cipollone's loss of consortium.

Shortly thereafter, Susan Haines as administratrix ad prosequendum and executrix of the Estate of Peter F. Rossi brought suit in the same court against the same three defendants as well as R.J. Reynolds Tobacco Co. and the Tobacco Institute, Inc. Haines was represented by the same attorney who represented the Cipollones. Jurisdiction was based on diversity, and once again the complaint alleged tortious conduct sounding in strict liability and negligence. The complaint also included an allegation of misrepresentation. The plaintiff sought compensation for the decedent's pain and suffering and for his death, which she alleged was the result of his smoking defendants' cigarettes.

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[2] Liggett and Philip Morris are well-known tobacco companies. Loews, originally an entertainment company but now a conglomerate, manufactures True Cigarettes.

B. *The Initial Protective Order*

The district court ordered discovery in both cases under the supervision of a federal magistrate. 28 U.S.C. § 636(b)(1)(A) (1982). Discovery proceeded until March 1985, and a large number of documents were produced by the defendants for inspection pursuant to Fed.R.Civ.P. 34. On that date, the defendants moved for an "umbrella" protective order. The defendants argued that such an order would facilitate the discovery process by reducing the number of occasions for lawyers' conferences and discussions about the confidentiality of particular documents. Defendants also argued that they had good cause for the protective order under Fed.R.Civ.P. 26(c)[3] and that the closely analogous *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), permitted a protective order in this case. Plaintiffs objected to the defendants' proposal, countering that the defendants' real purpose was to make it impossible for plaintiffs in other suits against the cigarette companies to share information gathered from the defendants. The defendants' strategy, said plaintiffs, was to raise the expense of litigation for future plaintiffs, thus making the cost of suits prohibitive.

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[3] The rule reads: Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. . . .

After hearing the matter, the magistrate found for defendants. On March 25, 1985, he entered identical protective orders in both cases. The crucial aspects of the protective orders may be summarized as follows: (a) "all information" produced in discovery, presumably confidential and non-confidential alike, could be used only for the instant cases and not for other cases or other purposes; (b) the defendants had the responsibility in the first instance of deciding in good faith which of their documents were confidential and marking them accordingly; (c) information marked confidential could be examined as a matter of course by plaintiffs' lawyer, his associates, and experts retained by plaintiffs or their lawyer for the cases; (d) if plaintiffs wished to disclose the information to anyone else, they had to inform defendants' counsel, who then had opportunity to apply to the court to prevent that disclosure; and (e) all documents and copies thereof had to be destroyed or returned at the conclusion of the litigation.[4]

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[4] The relevant portions of the Magistrate's protective order read as follows:

2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.

3. "Confidential information" as used herein means any information which is designated as "confidential". . . . Information shall be designated as confidential only upon a good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.

* * * * * * *

6. Confidential information may be inspected only by the following persons:

(a) Counsel of record for plaintiff and defendants [and other lawyers employed by plaintiff and defendants for this case];

(b) Experts retained by or on behalf of any party. . . .

* * * * * * *

10. Prior to the disclosure of any confidential information to any person, other than outside counsel and their employees or medical experts, the party seeking disclosure shall advise counsel and the Court, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose. . . . Within twenty (20) days after such advice, counsel to whom notice is given may . . . give written notice to adverse counsel of an application to this Court for an order prohibiting

*(footnote continued)*

C. *Plaintiffs' Appeal to the District Court*

Plaintiffs appealed the protective order to the district court, arguing that the order violated plaintiffs' first amendment rights to disseminate the information that they had received through discovery. Plaintiffs relied on *Seattle Times*, *supra*, arguing that the defendants and the magistrate had misconstrued the Supreme Court's holding in that case. They also argued that the defendants had failed to demonstrate good cause as required for a protective order by Fed.R.Civ.P. 26(c).

The district court filed a lengthy opinion, covering its scope of review of the magistrate's decision, the meaning and relevance of *Seattle Times*, the notion of "good cause" in Fed.R.Civ.P. 26(c), and the proper scope of the protective order. Disposition of the appeal requires that we describe each part of the district court's opinion in some detail.

1. *The District Court's Scope of Review of the Magistrate's Protective Order*

Although 28 U.S.C. § 636(b)(1)(A) states that a magistrate's order is not to be reconsidered unless it is "clearly erroneous or contrary to law,"[5] the district court ruled that its standard of review was plenary, relying on *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949,

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the proposed disclosure. No such disclosure shall take place until the Court has acted upon such application.

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13. Within forty-five (45) days after the final adjudication or settlement of all claims in this case, counsel for the parties shall either return all documents produced, if so requested by the producing party, or shall destroy such documents.

App. at 52-56, 59-63.

[5] *See also* Fed.R.Civ.P. 72(a); General Rule 40 D(4) of the U.S. Dist. Ct. for the Dist. of N.J. *See generally United States v. Raddatz*, 447 U.S. 667, 673, 100 S.Ct. 2406, 2411, 65 L.Ed.2d 424 (1980); *Merritt v. International Brotherhood of Boilermakers*, 649 F.2d 1013, 1016-17 (5th Cir. 1981).

80 L.Ed.2d 502 (1984), which held that an appellate court has plenary review over the finding of actual malice in libel cases. *See* Dist.Ct.Op. at A17-A18.[6]

2. *The District Court's Analysis of* Seattle Times

The district court next engaged in a lengthy first amendment analysis of protective orders in discovery. It reviewed the conflicting approaches of the circuit courts prior to *Seattle Times*[7] and then observed that *Seattle Times* had resolved the issue. The court quoted what it believed to be the relevant analysis from that case:

> The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing that question it is necessary to consider whether the "practice in question [furthers] an important or substantial governmental interest" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary to the protection of the

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[6] 28 U.S.C. § 636(b)(1)(B) also allows a district judge to designate a magistrate to submit to the court a report containing proposed findings of fact and recommendations for disposition. The court reviews *de novo* any portions of the report to which parties object. *Id.* The parties in this case agree that the magistrate was acting pursuant to § 636(b)(1)(A).

[7] One court required a showing of serious harm in the absence of a protective order and a demonstration that the proposed protective order would be the least restrictive means possible for avoiding the harm. *See In re Halkin*, 598 F.2d 176, 191-96 (D.C.Cir.1979). Another court held that the first amendment did not affect a court's authority to issue a protective order. *See International Products Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir.1963). A third court took a middle course, applying a balancing test that includes the magnitude of the threatened harm in the absence of a protective order, the breadth of the order, and the order's probable effectiveness. *See In re San Juan Star Co.*, 662 F.2d 108 (1st Cir.1981).

> particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974).

104 S.Ct. at 2207 (quoted in Dist.Ct.Op. at A21-A22).

The district court believed the passage established that, when a case involves matters of substantial public interest, a protective order implicates first amendment concerns and some constitutional analysis is required. Dist.Ct.Op. at A24-A25. The district court went further, explicitly analogizing the case before it to *Seattle Times* and holding that the same constitutional inquiry was appropriate in both cases: "It therefore remained there, and remains here, to decide only whether the protective orders at issue limited first amendment freedoms more than necessary or essential to protect the governmental interests furthered by Rule 26(c)." Dist.Ct.Op. at A22.

The court did note one point of confusion about *Seattle Times* that is relevant to our discussion below. Despite the Supreme Court's apparent endorsement in the above passage of a least restrictive means analysis, its *holding* subsumes a different analysis entirely. The district court quoted that holding in full:

> We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

104 S.Ct. at 2209-10 (footnote omitted) (quoted in Dist.Ct.Op. at A22-A23). As the district court noted, this explicit holding appears to exclude any first amendment analysis from the decision about whether a court should issue a protective order; that is, it implies that "if a protective order passes muster under Rule 26(c), it must, of necessity, be constitutional." Dist.Ct.Op. at A24. However, the analytical passage quoted earlier, *see supra* pp. 1113-14, implies that a court must apply a least restrictive alternative test to all proposed protective orders. Although it noted this apparent contradiction, the district court did not

resolve it explicitly, apparently assuming that *Seattle Times* imposed a least restrictive alternative test and that the test had to be read into the holding. *See* Dist.Ct.Op. at 24-25; *see generally infra* part IV (discussing the district court's first amendment analysis).[8]

3. *The District Court's Findings on Good Cause*

The district court noted that the party seeking the protective order bore the burden of proving that there was good cause for such an order. It also observed that a protective order could issue only upon a showing that disclosure would result in "clearly defined and serious injury." Dist. Ct.Op. at A26. Although early in its opinion the court suggested that there could be good cause only for revelation of technical information that might hurt one of the defendants' competitive positions,[9] the court later made it clear, as the caselaw has established, that lesser concerns, including "embarrassment," might constitute good cause for a protective order. Dist.Ct.Op. at A32 n. 8.[10]

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[8] The district court may have been motivated to make this assumption by its perception that a protective order would favor the economically powerful defendants and prevent the public and the relatively impecunious plaintiffs from gaining access to material in which there was an enormous public interest. *See id.* at A11 ("The court cannot ignore the might and power of the tobacco industry and its ability to resist the individual claims asserted against it and its individual members.")

[9] The court wrote that

> [d]efendants [are] entitled to protection from the disclosure of matters which are truly secret, where disclosure thereof will affect the operation of their business, but not their potential liability. Formulae, marketing strategy, and other matters whose disclosure would affect defendants with their respective competitors or in conjunction with the day-to-day operation of their business are entitled to protection. A10-A11.

[10] Rule 26(c) protects parties from a broad range of troubles: "annoyance, embarrassment, oppression, or undue burden or expense." Consistent with the spirit of the Rule, courts have held that a showing of harm to nonbusiness interests may constitute a good cause. *See, e.g., Krause v. Rhodes*, 671

*(footnote continued)*

After discussing these broad legal issues, the court turned to the particular facts before it, and found that neither the magistrate's opinion nor the submissions of the defendants sustained the burden of justifying the protective order. It found that "the reasons asserted are quite conclusory," *id.* at A28, and that defendants' suggestion that the magistrate's protective order would 'streamline the litigation' was not sufficient to carry the evidentiary burden. *Id.*

4. *The Scope of Confidentiality*

As noted above, the magistrate's order applied to *all* information produced during discovery. *See supra* p. 11; Magistrate's Order ¶2, *supra* note 4. The district court criticized this approach, stating that non-confidential material was, by definition, information for which no Rule 26(c) good cause had been shown and that therefore no protective order should protect such material. Dist.Ct.Op. at A29.

The district court also criticized the portion of the magistrate's order that had prohibited the use in any other case of the materials produced in this case's discovery. The district court said that the prohibition "undermine[d] the purpose of the Federal Rules of Civil Procedure 'to secure the just, speedy, and inexpensive determination of every action.'" Dist.Ct.Op. at A34 (quoting Fed.R.Civ.P. 1)(footnote omitted). Additionally, the court noted that prohibiting the use of materials from one case in other cases would burden both the plaintiffs and the defendant:

> There may be some claimants who do not have the resources . . . to pursue the thorough investigation which these cases require. To require that each and

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F.2d 212 (6th Cir.) (government's interest in conducting thorough and confidential investigations is ground for a protective order), *cert. denied*, 459 U.S. 823, 103 S.Ct. 54, 74 L.Ed.2d 59 (1982) *Galella v. Onassis*, 487 F.2d 986 (2d Cir.1973)(protection of public figure from physical and emotional harassment). The Supreme Court has expressly stated that Rule 26(c) protects privacy interests. *Seattle Times*, *supra*, 104 S.Ct. at 2208 n. 21.

> every plaintiff go through the identical, lone [sic] and expensive process would be ludicrous. Even from the point of view of the defendants (though they resist), it would seem that they would benefit by avoiding repetition of the same discovery in each and every case."

*Id.* at A11.

5. *The District Court's Amendment to the Protective Order*

The district court amended the magistrate's protective order in light of its conclusions as outlined above. The court's amendments were as follows: (a) whereas the magistrate's protective order had limited the use of all materials produced in discovery, the amended protective order would apply only to confidential materials and would not restrict the use of nonconfidential materials; (b) rather than making defendants' good faith the only limitation on their freedom to designate documents confidential, and forcing the plaintiffs to challenge the designation subject thereafter to rulings by the Court, the amended order required the defendants to demonstrate in a document-by-document showing to the court that each document they believed to be confidential was so in fact; the advantage of this system, the court explained, was that it "does not allow misuse of the confidentiality designation and places the burden of proving such confidentiality squarely upon defendants, as required by Rule 26(c) and the first amendment," *id.* at A29-A30; (c) although the court agreed that confidential information could not be released to the public, its order differed from the magistrate's in that the court's order allowed plaintiffs' counsel to use any and all confidential materials in cases in which he was a participant, *id.* at A32; and (d) the amended order eliminated entirely the provision requiring counsel to return or destroy all documents produced in discovery; this was done virtually without discussion, because defendants had not opposed plaintiffs' motion to eliminate the provision.[11]

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[11] The relevant portions of the district court's protective order read as follows (all parts of the district court's order that were not part of the magistrate's

*(footnote continued)*

The defendants immediately moved the district court for a stay of its own protective order. The district court granted a stay conditioned on defendants' instituting proceedings in the court of appeals, which they did promptly. We granted a further stay pending disposition of the appeal, having been informed that appellees had scheduled a press conference for the morning following expiration of the stay and that they would, at that time, release to the public all the documents obtained in discovery.

## II. COLLATERAL APPEALABILITY

[1] Discovery orders, being interlocutory, are not normally appealable. *See Borden Co. v. Sylk*, 410 F.2d 843, 845 (3d Cir.1969); 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2006 at 29 (1970 & Supp.1985). The first issue before us, therefore, is whether we have appellate jurisdiction. The defendants make two arguments in favor of appellate jurisdiction. First, they assert that the district court's protective order is a collateral order appealable under the rule of

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order are italicized; all parts of the magistrate's order that the district court omitted are in square brackets; unchanged portions are unmarked):

> 2. All "*confidential*" information produced *by defendants* [or exchanged] in the course of this civil action or any appeal arising therefrom (the "ligitation") *may be used in all cases in which plaintiffs' counsel in this action are counsel of record* [shall be used for the purpose of this case].
>
> 3. "Confidential information" as used herein means any *document* [information] which is *found by the court or agreed by the parties to be* [designated] "confidential" . . . . Information shall be designated as "*claimed* confidential" only upon the good faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto. *If defendants claim that a particular document is confidential, it shall be the defendants' burden to bring a motion before the court to determine whether the document in question is a confidential document under the Federal Rules of Civil Procedure and the precedents thereto. Failure of defendants to bring such a motion within ten days of advising plaintiffs'*
>
> *(footnote continued)*

*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In the alternative, they argue that this court should exercise its statutory power of mandamus, 28 U.S.C. § 1651 (1982), to review the order. We consider collateral appealability here and the mandamus argument in part III *infra*.[12]

Title 28 U.S.C. § 1291 (1982) provides that courts of appeals may review only "final" decisions of the district courts. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), however, the Supreme Court established a narrow exception to the rule of finality. *Cohen*

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*counsel of any claim of confidentiality shall constitute a waiver of any claim of confidentiality as to the document in question and permit removal of the claim of confidentiality. Should the court determine that the defendants have misused the "claimed confidential" designation, it will consider awards of costs including counsel fees incurred as a result of the misuse of said designation.*

* * * * * * *

*5. Confidential information may be inspected only by the following persons:*

*(a) Counsel of record for the plaintiff and defendants in this or other* litigation, any lawyers specifically employed by them in connection with this *or other* litigation and any employee of such counsel assisting with this *or other* litigation:

(b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation.

* * * * * * *

9. Prior to the disclosure of any confidential information to any person, other than counsel and their employees or experts, the party seeking disclosure shall advise the court and counsel, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose said confidential information. Within twenty days after such advice, counsel to whom notice is given may . . . give written notice to adverse counsel on an application to this court for an order prohibiting such disclosure. No such disclosure shall take place until the court has acted on such application.

* * * * * * *

[13. Within forty-five (45) days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy such documents.]

[12] Although we took this appeal before any documents had been challenged under the district court's protective order, the appeal is ripe. It is clear that

held that a prejudgment order of a district court can be reviewed if it falls within

> that small class [of prejudgment orders] which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

*Id.* at 546, 69 S.Ct. at 1225. *See also Mitchell v. Forsyth*, — U.S. —, —, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985); *Richardson-Merrell, Inc. v. Koller*, — U.S. —, —, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985).

[2] *Cohen's* progeny have established three requirements for the review of non-final orders: to be reviewed the order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978). We have made clear that each of the three requirements must be met before appellate review is permitted. *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 537 (3d Cir.1985); *Metex Corp. v. ACS Industries, Inc.*, 748 F.2d 150, 153 (3d Cir. 1984); *Lusardi v. Xerox Corp.*, 747 F.2d 174, 177 (3d Cir.1984); *Gross v. G.D. Searle & Co.*, 738 F.2d 600, 602 (3d Cir. 1984). This approach furthers the important goal of avoiding piecemeal litigation.

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we are not deciding mere hypothetical questions that we might avoid by refusing jurisdiction at this time, for the parties have indicated to us that they differ sharply over the propriety of disseminating several documents. It is also clear that, as the district court's alleged errors are purely legal, *see infra* parts IV and V, the issues before us are sufficiently concrete to allow for judicial determination and will not be better defined by waiting. Thus, nothing would be gained by waiting for a particular dispute to exercise appellate jurisdiction. Moreover, there is danger that, if we did not take this appeal, some documents would be released before we had the opportunity for review. That potential harm, once done, could not be undone. *See infra* III.A. Thus, this may be the only opportunity for meaningful appellate review.

[3] The second prong is not met here because defendants' claim touches on the merits of the underlying action. The underlying action raises issues concerning whether and when the defendants knew of the health hazards associated with smoking cigarettes and what steps the defendants allegedly took to mislead the public about those hazards. Defendants contend that the materials should not be disseminated because they would present a distorted and unfair picture about what the defendants knew about the effects of cigarettes on health. Our evaluation of defendants' argument would take us into the merits of the underlying action because we would have to make a judgment about what defendants knew and what steps they may have taken to mislead the public—precisely the issues at the heart of the underlying action. *See supra* pp. 1111-12.[13] Because the second prong is not satisfied, we do not have jurisdiction under the *Cohen* doctrine.

## III. MANDAMUS

[4] The All Writs Act, 28 U.S.C. § 1651(a) (1982), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." Although writs of mandamus are extraordinary devices and we have read § 1651(a) narrowly, mandamus has been held to be appropriate when a failure to issue the writ would lead to the disclosure of confidential materials. *See, e.g., Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir.1984); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.1979); *In re Halkin*, 598 F.2d 176 (D.C.Cir. 1979). In *Sporck v. Peil*, 759 F.2d 312, 314 (3d Cir.1985), we held that a writ of mandamus should issue when (A) the party seeking the writ has "'no other adequate means to attain the relief he desires,'" (quoting *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980)), and (B) the court below has committed a clear error of law. We consider these requisites in turn.

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[13] This case is thus similar to *State of New York v. United States Metal Refining Co.*, 771 F.2d 796 (3d Cir.1985), in which a panel of this court held that

*(footnote continued)*

A. *Other Avenues of Redress*

No other paths to appellate review are available to defendants. First, if defendants are required to wait until the final order of the litigation, their appeal on this issue would be valueless. The harms defendants seek to avoid are embarrassment and prejudice in the community at large. Defendants thus require injunctive relief, for compensatory damages would be virtually impossible to assign. Unless the district court's order is vacated, the materials will be released; thereafter, it will be impossible, practically speaking, to rectify the harm. *See C & C Products, Inc. v. Messick*, 700 F.2d 635, 637-38 (11th Cir.1983) (appeal from district court's modification of a protective order dismissed as moot because the materials had already been released and "no order from this court can undo that situation."). Second, as we have already seen *supra* II., the district court's order is not appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*[14]

B. *Clear Error of Law*

[5] Mandamus is not available for abuse of discretion. Rather, we exercise mandamus jurisdiction only if we find that the district court committed a clear error of law. *Sporck*, 759 F.2d at 314. This requirement is satisfied because the district court made two clear errors of law. First, it misread *Seattle Times v. Rhinehart* and imposed under Fed.R.Civ.P. 26(c) a more

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it did not have *Cohen* jurisdiction to review an order prohibiting dissemination of a report prepared by the State of New York about the pollution practices of United States Metal Refining Company (USMR). USMR's argument against dissemination was that the report was biased and inaccurate. We held that because an evaluation of that argument would involve an inquiry into the actual environmental practices of USMR, a decision on the protective order would necessarily involve it with the merits of the underlying action. *Id.* at 800.

[14] Neither can defendants obtain immediate appellate review by certification pursuant to 28 U.S.C. § 1292(b) (1982), for the district court made no such certification nor could it have, since that provision limits review by certification to orders "an immediate appeal from [which] may materially advance the ultimate termination of the litigation." The protective order at issue here,

*(footnote continued)*

stringent good cause standard than was necessary or appropriate. Second, on account of its misreading of *Seattle Times*, it exercised plenary review over the magistrate's order when the "clearly erroneous" standard was required. As both of these errors were germane to its decision, *see* discussion *infra*, they are independent grounds for reversal. We take these matters up in turn.

## IV. THE DISTRICT COURT'S MISREADING OF SEATTLE TIMES

As we have noted, the district court identified an ambiguity in the *Seattle Times* opinion: it was unclear whether *Seattle Times* mandated a Rule 26(c) analysis without regard to the first amendment, or whether it required an analysis that included a strict least restrictive means test. *See* discussion *supra* pp. 1114-15. *See also* Post, *The Management of Speech: Discretion and Right*, 1984 Sup.Ct.Rev. 169, 181-82 (noting the same point). This ambiguity may be significant because the good cause analysis, although by no means toothless, *see infra* part VI.A. is significantly less stringent than the least restrictive means test. The district court chose the latter alternative without explanation and analyzed the case in first amendment terms, applying the least restrictive means test. *See* Dist.Ct.Op. at A22. While we recognize the ambiguity in *Seattle Times*, we believe for several reasons that the district court misinterpreted *Seattle Times* and that *Seattle Times* prohibits a court considering a protective order from concerning itself with first amendment considerations.

We recently had opportunity in a case very similar to this one, *State of New York v. United States Metal Refining Co.*,

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although not completely separate from the substantive issues of the case, *supra* p. 1118, is substantially collateral to them and is certainly not of the pivotal nature required for certification. *Cf. Evanson v. Union Oil Co. of California*, 619 F.2d 72, 74 (Em.App. 1980); C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2006 at 31 (1970 & Supp. 1985) ("Ordinarily it is difficult to believe that a discovery order will present a controlling question of law or that an immediate appeal will materially advance the termination of the litigation.").

771 F.2d 796 (3d Cir.1985) to interpret *Seattle Times*. We found there that *Seattle Times* confirmed our previous suspicion that protective orders in civil discovery did not require first amendment analysis:

> This court has noted that an order prohibiting the disclosure of information obtained under the rules of discovery probably does not run afoul of the first amendment. *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976). . . . The Supreme Court confirmed our point of view in the *Seattle Times* case. 104 S.Ct. at 2009-10.

*New York v. United States Metal Refining Co.*, 771 F.2d at 802. Thus, *United States Metal Refining Co.* is clear precedent for the interpretation eschewed by the district court.[15]

This holding would appear to end our inquiry. However, because the district court's interpretation of *Seattle Times* raises questions not considered in *United States Metal Refining Co.*, it is appropriate and useful to review the *Seattle Times* opinion in the light of these questions. That review confirms the soundness of *United States Metal Refining Co.*'s reading of *Seattle Times*. In the first place, the Supreme Court's holding in *Seattle Times* was peremptory: "a protective order. . . entered on a showing of good cause as required by Rule 26(c). . . does not offend the First Amendment." 104 S.Ct. at 2209-10. This statement leaves no room for lower courts to consider first amendment factors in fashioning or reviewing Rule 26(c) orders. The unequivocal nature of the Court's holding supersedes any ambiguity in its earlier discussion.

Second, the rest of the Supreme Court's opinion, which emphasized that the discovery process was not a forum traditionally open to the public, 104 S.Ct. at 2208, and that the process was "a matter of legislative grace," *id.* at 2207, to which no

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[15] We note that *United States Metal Refining Co.* was decided about two months after the district court's order in this case, and therefore the district court did not have the benefit of it at the time of its decision.

first amendment rights attached, is consistent with the position that the first amendment is simply irrelevant to protective orders in civil discovery; it does not comport with the district court's insistence on a less restrictive means test in protective order determinations. Although the Supreme Court's dictum about less restrictive means analysis is to the contrary, *see* 104 S.Ct. at 2207, this dictum is insufficient to overcome the weight of the Court's holding and the evident direction of the Court's reasoning.

Finally, we note that the overwhelming number of courts that have considered this issue have reached the same conclusion. *See Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1223-24 n. 4 (7th Cir.1984) (in light of *Seattle Times*, court need only undertake a Rule 26(c) good cause analysis without consideration of First Amendment); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172-73 (D.C.Cir.1984) (*en banc*) (same); *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 566 (E.D.N.Y.1985) (same). But *see Michelson v. Daly*, 590 F.Supp. 261, 266 (N.D.N.Y.1984) (*Seattle Times* demands a least restrictive alternative test for protective orders in civil discovery). This precedent gives us further confidence in our analysis.

We may summarize thus. *Seattle Times* required the district court merely to inquire whether the defendants had demonstrated good cause for the protective order; the district court instead applied a least restrictive means test. The good cause standard is significantly less demanding than the least restrictive means test; the court's error, therefore, may have worked a serious detriment to the defendants. The court's error thus constitutes a clear error of law sufficient for our exercise of mandamus jurisdiction.

## V. THE DISTRICT COURT'S STANDARD OF REVIEW

The district court also erred because it reviewed the magistrate's order under an incorrect standard. Title 28 U.S.C. § 636(b)(1)(A) (1982) explicitly states that the district court may modify the magistrate's order only if the district court finds that

the magistrate's ruling was clearly erroneous or contrary to law. The district court in the instant case, however, held that *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485,104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), mandated plenary review regardless of the statutory standard of review. *Bose* held that when questions of constitutional fact arise in the first amendment context – questions like whether a speaker had "actual malice"; whether speech was libelous or an incitement to riot; whether pictures appeal to "prurient interests" or are "patently offensive" – an appellate court is bound to exercise plenary review on account of the crucial values at stake. *Id.* 104 S.Ct. at 1961-65. The district court reasoned that because it was acting as an appellate court in reviewing the magistrate's order, *Bose* should control. Dist.Ct.Op. at A17-A18.

The flaw in this logic stems from the same error discussed above, the district court's misreading of *Seattle Times*. Believing that *Seattle Times* made first amendment analysis an important part of its Rule 26(c) inquiry, the district court found that *Bose* applied. As we have seen, however, *Seattle Times* says exactly the opposite: that first amendment considerations are irrelevant to Rule 26(c) protective orders. Because the first amendment is irrelevant to the analysis, there are no grounds for extending *Bose* to this situation. The "clearly erroneous" standard obviously would have been less onerous for the defendants than was the district court's plenary review standard. Thus, the court's error may have harmed the defendants, and this error also constitutes a clear error of law sufficient for our exercise of mandamus jurisdiction.

These errors require that we reverse the district court's judgment and remand for reconsideration of good cause. Although it might be possible for us to review the magistrate's protective order ourselves, we feel it would be unwise to do so. Review of the order will require detailed consideration of the defendants' assertion of good cause. Such consideration would be exceedingly difficult without the district court's prior analysis of the matter under appropriate constitutional standards. *Cf. Tavoulareas v. Washington Post*, 737 F.2d 1170, 1172

(D.C.Cir.1984)(*en banc*) ("It would seem strange for the appellate court. . . to decide the 'good cause' question initially—especially when, as here, the District Court, has had no opportunity to decide it free from erroneously imposed constitutional restraints."). It would be equally unwise for us to "tailor" or adjust the order, for the good cause hearing will likely reveal the appropriate shape that the protective order should take and it is thus better that any delineation of specifics await that hearing. We accordingly shall grant the writ, and allow the district court to reconsider the magistrate's protective order in a manner consistent with this opinion.

## VI. TWO REMAINING ISSUES

In view of our holding, the district court will perforce be obliged to take second looks at the good cause issue (no specific good cause findings have been made), and at the magistrate's protective order. With respect to the later issue, we note that our holding has not resolved a critical aspect of the protective order litigation that the record reveals to be still festering: whether the district court was justified in its use of the document-by-document approach as opposed to a broader approach in its reformulation of the magistrate's protective order. These two issues were contested in the district court, and colloquy at oral argument revealed that they are still at issue and will likely arise again. Therefore, we address them for the guidance of the district court.[16]

### A. *Embarrassment and Good Cause*

Whether defendants have shown good cause for a protective order has been the issue at the heart of this case, and will likely

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[16] Discussion of these issues comports with the "instructional goals" of mandamus, *see Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592 (3d Cir.1984) ("review would comport with the instructional goals of mandamus,'" *quoting United States v. Christian*, 660 F.2d 892, 897 (3d Cir.1981)); *see also Will v. United States*, 389 U.S. 90, 107, 88 S.Ct. 269, 280, 19 L.Ed.2d 305 (1967) (mandamus review has a "vital corrective and didactic function").

remain so. The defendants assert that although the material they have turned over does not contain trade secrets, it does include materials the dissemination of which would cause them annoyance and embarrassment sufficient to justify a broad protective order. The plaintiffs contend that the defendants have not made a sufficiently convincing showing of the harm they would suffer from dissemination and that their allegations of harm are merely conclusory.

[6] As the district court explained, Rule 26(c) places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. *See United States v. Garrett*, 571 F.2d 1323, 1326, n. 3 (5th Cir.1978) (requiring "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements"); *General Dynamics Corp. v. Selb Mfg. Corp.*, 481 F.2d 1204, 1212 (8th Cir.1973), *cert. denied*, 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2035 (1970 & Supp.1985). Moreover, the harm must be significant, not a mere trifle. *See e.g., Joy v. North*, 692 F.2d 880, 894 (2d Cir.1982) (refusing protective order where proponent's only argument in its favor was the broad allegations that the disclosure of certain information would "injure the bank in the industry and local community"), *cert. denied sub nom. City-trust v. Joy*, 460 U.S. 1051, 103 S.Ct. 1498, 75 L.Ed.2d 930 (1983).

[7] Although there appears to be a lurking dispute as to what may constitute good cause for a protective order, *see* discussion *supra* at pp. 1114-15, we are satisfied that the district court understood and will apply on remand the principle that Rule 26(c) protects parties from embarrassment as well as from disclosure of trade secrets. We add to the district court's comments only our own understanding that, because release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an

applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground. *Cf. Joy v. North, supra* (a protective order will not issue upon the broad allegation that disclosure will result in injury to reputation); to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.

B. *Administration of the Protective Order*

Under the district court's order, the defendants would be forced to demonstrate to the Court on a document-by-document basis which documents should be protected and not disseminated before they could even be marked "confidential." The district court felt compelled to adopt this solution because it recognized that the burden of persuasion fell on the party seeking the protective order, and it believed that allowing defendants to mark documents confidential in the first instance – bound only by their good faith – and requiring plaintiffs to oppose the confidentiality designation would impermissibly shift the burden of proof to the plaintiffs. Dist.Ct.Op. at A29-30. The defendants object that the district court's order is unduly restrictive and burdensome.

[8] It is correct that the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head. That does not mean, however, that the party seeking the protective order must necessarily demonstrate to the court in the first instance on a document-by-document basis that each item should be protected. It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad "umbrella" protective order upon a threshold showing by one party (the movant) of good cause. Under this approach, the umbrella order would initially protect all documents that

the producing party designated in good faith as confidential.[17] After the documents delivered under this umbrella order, the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents. The burden of proof would be at all times on the movant; only the burden of raising the issue with respect to certain documents would shift to the other party.

As the commentary in the *Manual for Complex Litigation Second* (MCL 2d) (1985) makes clear, the umbrella order approach has several advantages over the document-by-document method adopted by the district court in a complex case,[18] and

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[17] Admittedly, there is a danger here that counsel will err on the side of caution by designating confidential any potentially sensitive document. The judge must require that counsel not mark documents as protected under the order unless they are at least arguably subject to protection. Manual for Complex Litigation Second, (MCL 2d) § 21.431 (1985). MCL 2d provides that "[t]he designation of a document as confidential may be viewed as equivalent to a motion for protective order and subject to the sanctions of Fed.R.Civ.P. 26(g)." *Id.* We agree.

[18] First, because in any large-scale litigation the movant will likely have far more documents that it wants to designate as confidential than the respondent will object to being so designated, the umbrella order approach is less time-consuming and burdensome to the parties and the court than the document-by-document method. In a very large case, the document-by-document approach may be so costly that it may make large-scale litigation too expensive for all but the most affluent parties. Moreover, the time that it would take a judicial officer to rule on the protectability of thousands of documents could cripple the court. By contrast, the umbrella order will encourage efficiency and allow litigation to proceed more quickly. *See* MCL 2d § 21.431 at 51-54.

Second, although a smooth, largely self-regulating discovery process should be the court's goal, *id.* at § 21.423 at 49, the document-by-document approach guarantees extensive involvement by the court in the discovery process, deterring the parties from themselves conducting discovery to a signficant extent. The umbrella order approach we have described encourages parties to work problems out between and among themselves.

Finally, the document-by-document approach may prevent the parties and the magistrate or judge from getting a broad overview of the documents. The

*(footnote continued)*

MCL 2d recommends the use of umbrella orders in complex cases.[19] The caselaw also supports the view that the use of umbrella orders in the district court is a useful method of dealing with large-scale discovery.[20]

There may be cases in which the document-by-document approach adopted by the district court, which deters overdesignation of confidentiality and imposes heavier costs on parties making the confidentiality designation, will be preferable. A case in which the district court has reason to believe that virtually all confidentiality designations will be spurious may be

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magistrate or judge may be so burdened by the argument over each document that she or he will "lose the forest for the trees." This confusion is not a problem under the umbrella order solution proposed here. In *In re* "Agent Orange" Product Liability Litigation, 96 F.R.D. 582, 585 (E.D.N.Y.1983), Judge Pratt, sitting by designation, summarized the reasons underlying the umbrella order approach:

> The interest of preserving the efficient and effective functioning of the discovery process weighs substantially in favor of a protective order, *In re Halkin*, *supra*, 598 F.2d at 192, and there is no question that this interest would be significantly impaired were there no protective order in this case.
>
> The special master's protective order shifts the very slight burden of going forward to the proponents of dissemination. Those wishing to disseminate merely need to indicate which documents they wish to disseminate, and the burden is then upon those opposing dissemination to show "good cause" pursuant to FRCP 26(c) why the protective order should be continued. It is hoped that this procedure will result in the court's having to review only those particular documents a party wishes to disseminate, rather than having to review every document that some party wants covered by a protective order.

[19] "'Umbrella' protective orders, carefully drafted to suit the circumstances of the case, greatly expedite the flow of discovery material while affording protection against unwarranted disclosures." *Id.* at § 21.431 at 53 (footnote omitted); *see also id.* at § 41.36 at 379-83 (sample confidentiality order including umbrella provision).

[20] *See, e.g., Chambers Development Co., Inc. v. Browning-Ferris Industries*, 104 F.R.D. 133, 135 (W.D.Pa.1985); *In re Korean Airlines Disaster of*

*(footnote continued)*

such a case. Our purpose in extending the discussion is to explain that the district court erred to the extent that it felt *obliged* to utilize the document-by-document approach to avoid shifting the burden of proof of confidentiality, and to commend the umbrella approach for consideration of the district courts in this circuit in complex cases.

## VII. CONCLUSION

Because of the district court's misinterpretation of *Seattle-Times v. Rhinehart* and its consequent errors in defining the appropriate good cause standard and its own scope of review of the magistrate's findings, we will grant the writ.

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*September 1, 1983*, 597 F.Supp. 621, 622-23 (D.D.C.1984); *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 583 (E.D.N.Y. 1983); *Tavoulareas v. Piro*, 93 F.R.D.. 24, 29-30 (D.D.C.1981); *see generally* Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L.Rev. 1, 8 (1983) (noting "[t]he tendency of courts to enter protective orders, sometimes sua sponte, limiting the use of *all* information produced through discovery") (footnotes omitted). This method was used by the court in *Palmer v. Liggett Group, Inc.*, Civ.Action No. 83-2445-MA (D.Mass. Feb. 25, 1985), a cigarette products liability suit very similar to the one here. It was, of course, used by the magistrate in this case. *See supra* at n. 4.

Opinion of the District Court
Dated July 17, 1985

ROSE D. CIPOLLONE and
ANTONIO CIPOLLONE,

Plaintiffs,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED
and LOEW'S THEATRES, INC.,

Defendants.

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No. 83-2864

United States District Court,
District Court of New Jersey
Decided July 17, 1985

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## OPINION

SAROKIN, District Judge:

This is an appeal from an order of the magistrate prohibiting the plaintiff from disseminating or publicizing documents, testimony and other matters obtained through the discovery process. In reviewing an order of this nature, certain fundamental principles must be considered before addressing the specific terms and conditions of the order on appeal.

Materials obtained through the discovery process are the result of a form of judicial compulsion. Were it not for the existence of the ongoing litigation, the parties would not have access to most of the information so produced. Such production has been mandated under the rules so as to assure the full exchange of information and ultimately a fair determination on the merits after complete exploration of all of the relevant facts.

[1] The extensive discovery allowed under the Federal Rules of Civil Procedure was never intended as a device to procure information for a purpose unrelated to the pending litigation. However, having once obtained information which is properly within the ambit of the Rules, the question arises as to what other use, if any, can be made of the fruits of such discovery. Generally speaking, discovery materials fall into three categories: 1) that which is already public knowledge; 2) that which is private, *i.e.*, something that would not be known publicly but for the discovery; and 3) that which is truly secret, the revelation of which would substantially injure the custodian or another.

[2] Obviously in this case we are not concerned with the first category, since there is no reason to protect matters already in the public domain. It is the second category which creates the greatest difficulty. In the usual private litigation not involving the public interest, it would not be appropriate to permit the release of private materials whose existence and content were disclosed only as the result of the litigation. However, that right of privacy must be balanced against the first amendment and consideration of whether the information so obtained is of such great interest as to permit its publication beyond the litigation itself.

It would be difficult to envision a case involving a greater or more widespread interest. Other than food and water, there is probably no substance more utilized than tobacco. Its use affects hundreds of millions of people throughout the world. Its effects have been debated and reported in the press extensively. It has been the repeated subject of legislation, medical investigation and now litigation.

[3] Plaintiffs contend that the discovery in this matter reveals the knowledge of the tobacco industry regarding the effects of smoking, the steps taken to conceal and offset that knowledge, the efforts to enlist the aid of legislators and the medical profession to support the industry and mislead the public, and an alleged conspiracy of silence and chicanery within the industry itself. The court makes no finding at this juncture as to the validity of any of those charges, but it cannot be a party to their suppression if they are true. In the court's view, none of the

foregoing appear to come within the third category mentioned above. These matters may be private and their disclosure may prove embarrassing and incriminating, but that alone would not be sufficient to bar them from the public and the press.

[4] Defendants continue to be entitled to protection from the disclosure of matters which are truly secret, where disclosure thereof will affect the operation of their business, but not their potential liability. Formulae, marketing strategy and other matters whose disclosure would affect defendants with their respective competitors or in conjunction with the day-to-day operation of their business are entitled to protection. But their part, *if any*, in concealing or misrepresenting information regarding the risks of smoking is not entitled to such protection.

There is a further reason for permitting the disclosure of such information and that is the existence of numerous other similar suits, particularly those in which the same counsel are representing plaintiffs. The court cannot ignore the might and power of the tobacco industry and its ability to resist the individual claims asserted against it and its individual members. There may be some claimants who do not have the resources or such able and dedicated counsel as in this case to pursue the thorough investigation which these cases require. To require that each and every plaintiff go through the identical, long and expensive process would be ludicrous. Even from the point of view of the defendants (though they resist), it would seem that they would benefit by avoiding repetition of the same discovery in each and every case. There can be no justification for defendants' position other than to discourage other claimants and deprive them of evidence already known and produced to others similarly situated.

For these reasons, the court is compelled to reverse in part and affirm in part the protective order entered by the magistrate in this matter. Under the first amendment the public has a right to know what the tobacco industry knew and knows about the risks of cigarette smoking and what it did or did not do with regard to that knowledge.

[5] The order in its present form interferes with the first amendment in that it extends protection to all discovered materials and imposes upon plaintiffs the obligation to move for their release from the prohibitions of the order. To impose such a threshold requirement upon a single plaintiff against a giant industry diminishes the first amendment rights of others who should have access to such information, namely the general public and other similarly situated claimants. The obligation to move for such protection and justify its need should be upon defendants, rather than upon plaintiffs. The presumption should be one of freedom to publish rather than one of restraint. To impose such burden upon plaintiffs and require them to remove barriers unilaterally imposed by defendants would result in an expenditure of time and money which alone could destroy the first amendment rights here implicated.

## THE ORDER

The Protective Order here appealed from was entered on March 25, 1985 by the Honorable Robert E. Cowen, United States Magistrate, who has been ably supervising discovery in these complex cases. The Order limits the extent to which plaintiffs may disclose certain confidential information made available by defendants in discovery proceedings regarding these matters. To that end, the Order provides that "[a]ll information produced or exchanged in the course of this civil action or any appeal arising therefrom ... shall be used solely for the purpose of this case," ¶2, and shall be returned or destroyed after trial. ¶13. More complex limitations are imposed upon "confidential information." Based upon a "good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure," ¶3, such information, which may be documentary, oral, or even in the nature of summaries, ¶8, is to be labelled accordingly, ¶4, and filed, or otherwise utilized, under seal. ¶¶11-12. *See also* ¶5 (deposition testimony). Nor may claims of confidentiality be inadvertently waived. ¶9.

Once labelled, confidential information is, under the order, open for inspection only by counsel or their associates or

employees, ¶6(a), or by experts retained for the purposes of the litigation, ¶6(b), but the latter are required to sign an oath attesting to their understanding that they are bound by the terms of the order. ¶7. Any disclosure other than to counsel and medical experts may be made only upon express or implied consent or, lacking consent, permission of the court. ¶10. In obtaining such consent, "the party seeking disclosure shall advise counsel and the court, in writing, of the name, address and occupation of the person to whom counsel proposed to disclose, for the purposes of this litigation, said confidential information." *Ibid.* Additional protections, or other modifications of the order, may also be sought. ¶¶15-16.

Plaintiffs argue that entry of this order constitutes an abuse of discretion, and a violation of both the first amendment and of basic discovery principles. In particular, plaintiffs attack now, as they attacked below, the following aspects of the order:

(1) plaintiffs contend that it is improper to require *all* information produced or exchanged to be used only in the instant litigation. ¶2. They argue that it is only appropriate to limit the use of *confidential* information and that, in any event, counsel should be able to use the information gathered here in other cases in which they are counsel of record. *See* Plaintiffs' Exh. B, ¶2; Exh. C, ¶2, Plaintiffs' Brief at 24-25. Plaintiffs also propose to allow witnesses to use information disclosed herein in other cases in which they are expert witnesses, or in which plaintiffs' counsel are counsel of record. Plaintiffs' Exh. B, ¶6; Exh. C, ¶6; Plaintiffs' Brief at 29-31. *See* Order ¶7.

(2) plaintiffs contend that there must be an enforcement mechanism in the event that defendants label confidential that which is not. The enforcement mechanism suggested by plaintiffs requires defendants to establish the confidentiality of a challenged document by motion, and to pay costs and counsel fees if they cannot. *Compare* Order ¶3 *with* Plaintiffs' Exh. B, ¶3; Exh. C., ¶3. *See also* Plaintiffs' Brief at 25-27. Indeed, much of plaintiffs' excellent brief is devoted to providing the court with examples of documents which defendant has marked as confidential, but which plaintiffs argue should not be, since they

contain not trade secrets, but documentation of cigarette industry public relations strategies, some of which consist of matters of public record. *See* Plaintiffs' Brief at 10-22 and Exhs. J-Y.

(3) plaintiffs do not include depositions in the list of types of discovery information which may be labelled "confidential." *Compare* Order ¶5 *with* Plaintiffs' Exhs. B-C. *See* Plaintiffs' Brief at 28.

(4) plaintiffs argue that documents already disclosed ought not be able to be retroactively labelled confidential. *Compare* Order ¶9 *with* Plaintiffs' Exhs. B-C. *See* Plaintiffs' Brief at 31-33.

(5) plaintiffs' most vehement objection is to paragraph ten of the order. They contend that, as drafted, such paragraph requires counsel to identify persons to whom confidential information will be disclosed, thereby allowing "defendants to control and manipulate the preparation and trail of plaintiffs' case." Plaintiffs' Brief at 10. *See also Id.* at 79-81. As an alternative, plaintiffs suggest that the names, addresses and occupations of the recipients of such information be filed with the court only, along with a certification to the effect that such recipients "are not now, have never been, or do not contemplate any association with a competitor of defendant," and that they will not disclose such information except for purposes of litigation. Such information and certification would be filed under seal. *See* Plaintiffs' Exh. C, ¶8; Transcript of Proceedings (3/25/85) at 26-28. The Magistrate, however, rejected this suggestion, holding that defendants had a right to know plaintiffs' proposed expert witnesses "before you sign them on," *id.* at 29, "before he sees document one." *Id.* at 30.

(6) plaintiffs object to the requirement in paragraph thirteen of the order that they return or destroy discovery materials which they label "proprietary." Plaintiffs' Brief at 36.

(7) finally, plaintiffs object to paragraphs fifteen and sixteen of the order, fearing that the already broad protection afforded defendants may be expanded in the future. *Id.* at 37.

Plaintiffs' arguments are couched in terms of important first amendment principles, as well as standard notions of maximizing the efficiency, breadth and openness of the discovery process. Nonetheless, the Magistrate rejected such arguments, holding instead that the Order entered would "facilitate the efficacious production of documents and discovery of the defendants to some extent and that it will streamline the litigation to the point where the discovery sought and had in this case will be for this case and this case alone, and that at the time this case is tried that, of course, anything that goes into the record at that time will be of a public matter and public information." Transcript of Proceedings at 56. In so deciding, the Magistrate followed the lead of the United States District Court for the District of Massachusetts which, on February 25, 1985, entered an identical order in the matter of *Palmer v. Liggett Group Inc.*, Civil Action No. 83-2445, *see* Liggett's Brief, Exh. B, as well as that of the Honorable John W. Devine, United States Magistrate for the District of New Jersey, in the matter of *Barnes v. R.J. Reynolds Tobacco Co.*, Civil Action NO. 84-56 (AET). Since the entry of the order here appealed from, the United States District Court for the Western District of Oklahoma has entered an order in a smokeless tobacco products liability case far more favorable to plaintiffs: only confidential information was covered; defendant was required in the event of a dispute to demonstrate confidentiality; and the identity of non-medical experts was not required to be revealed prior to their review of confidential information. *See* Plaintiffs' Reply Brief at 4-7 and Exh. C; Aff. of Marc Z. Edell (5/6/85) ¶ 6. Hence, this court addresses such issue in the wake of divided precedent.

## DISCUSSION

### A. *Standard of review*

[6] In reviewing the Protective Order here at issue, the court is cognizant of the limited scope of its review of nondispositive pretrial rulings by the Magistrate: the court may reverse only if such rulings are "clearly erroneous or contrary to law." 28 U.S.C. §636(b)(1)(A); Fed.R.Civ.P. 72(a); General Rule 40 D(4)(a) of the U.S.Dist.Ct. for the Dist. of N.J. *See generally United*

*States v. Raddatz*, 447 U.S. 667, 673, 100 S.Ct. 2406, 2411, 65 L.Ed.2d 424 (1980); *Merritt v. International Brotherhood of Boilermakers*, 649 F2d 1013, 1016-17 (5th Cir.1981); *Empire Volkswagen, Inc. v. World-Wide Volkswagen, Inc.*, 95 F.R.D. 398, 399 (S.D.N.Y. 1982) (a litigant who seeks to overturn a magistrate's discovery order "bears a heavy burden"). *See also Gross v. G.D. Searle & Co.*, 738 F.2d 600, 602 (3d Cir.1984) (court reviewed protective order under clearly erroneous or contrary to law standard). However, because first amendment rights are implicated, the court is required to assess the record independently "to make sure 'that the [order] does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, ____, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984), quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-86, 84 S.Ct. 710, 728-29, 11 L.Ed.2d 686 (1964) and citing *NAACP v. Claiborne Hardware*, 458 U.S. 886, 933-34, 102 S.Ct. 3409, 3436-37, 73 L.Ed.2d 1215 (1983); *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed.2d 6 (1970); *St. Amant v. Thompson*, 390 U.S. 727, 732-33, 88 S.Ct. 1323, 1326-27, 20 L.Ed.2d 262 (1968). For this reason, the court here "exercise[s] its ultimate prerogative to conduct a *de novo* review" of the Magistrate's ruling. *Foster v. Gloucester County Board of Chosen Freeholders*, 465 F.Supp. 293, 296 (D.N.J.1978). *See also* 7 Moore's *Federal Practice* ¶ 72.02[4.-9], at 72-20, ¶ 72.04[2.-6], at 72-53 (1984); 12 C. Wright & A. Miller, *Federal Practice and Procedure* § 3076.5, at 34 (1985 Supp.), citing, *e.g.*, *West v. Redman*, 530 F.Supp. 546, 547-48 (D.Del.1982).

B. *The First Amendment Analysis*

Prior to May 21, 1984, the problem posed by the conflict between the first amendment right to free expression, on the one hand, and the court's responsibility to oversee the discovery process, on the other, was the subject of considerable debate and legal uncertainty. The nation's courts of appeal were divided on the issue: the Court of Appeals for the District of Columbia Circuit, in the much-discussed case of *In re Halkin*, 598 F.2d 176 (D.C.Cir.1979), held that first amendment rights attach to materials made available through the discovery process, 598 F.2d

at 190, and that protective orders trenching on such rights pass constitutional muster only if

> the harm posed by dissemination [is] substantial and serious; the restraining order [is] narrowly drawn and precise; and there [is] no alternative means of protecting the public interest which intrudes less directly on expression.

598 F.2d at 191.[1] The Court of Appeals for the First Circuit adopted a less stringent standard, which it characterized as "a position...midway between those taken in the majority and dissenting opinions in *Halkin*."[2] *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir.1981). It described such position as follows:

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[1] *Halkin* was much criticized by the commentators. *See, e.g.*, R. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L.Rev. 1 (1983); Note, *the First Amendment Right to Disseminate Discovery Materials: In re Halkin*, 92 Harv.L.Rev. 1550 (1979). *But see* Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 Colum.L.Rev. 1645 (1980) (approving the standard adopted in *Halkin*, while criticizing its reasoning). Nonetheless, the *Halkin* standard was extended to communications between lawyer and client by the D.C. Circuit, *see Doe v. District of Columbia*, 697 F.2d 1115, 1120 (D.C. Cir. 1983), and seemed to be adopted by at least one other circuit. *See Krause v. Rhodes*, 671 F.2d 212, 219 (6th Cir.) (post-trial dissemination), *cert. denied*, 459 U.S. 823, 103 S.Ct. 54, 74 L.Ed.2d 59 (1982); *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423-25 (6th Cir.1981). More important, it proved extremely influential in the district courts, which either followed it, *see, e.g., United States v. General Motors Corp.*, 99 F.R.D. 610, 612 (D.D.C.1983); *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C.1981); *Brink v. DaLesio*, 82 F.R.D. 664, 677-78 (D.Md.1979); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 81 F.R.D. 482, 485-86 (E.D.Mich. 1979), *aff'd*, 664 F.2d 114 (6th Cir.1981), or at the very least, were obliged to come to terms with it. *See, e.g., International Union v. Garner*, 102 F.R.D. 108, 111-13 (M.D.Tenn.1984); *In re Agent Orange Product Liability Litigation*, 98 F.R.D. 539, 542 (E.D.N.Y.1983) *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 475-80 (S.D.N.Y.1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F.Supp. 866, 908-15 (E.D.Pa.1981).

[2] The latter focused solely upon whether "good cause" had been shown pursuant to Federal Rule of Civil Procedure 26(c), concluding that where good cause was not established, the first amendment was violated, and where good cause was established, no first amendment violation could exist. 598 F.2d at 209.

> We look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary. Our adaption [sic] of this standard in a civil discovery context, however, allows a court to be slightly less severe when considering the degree and imminence of the harm that might ensue if communications to the press are not prohibited. Thus, we consider the magnitude of the harm threatened by disclosure and the likelihood of that harm occurring, but we think these considerations are best applied on a sliding scale: as the potential grows more grave, the imminence necessary is reduced.

*Ibid.* The Second Circuit disagreed with the notion that first amendment concerns were implicated by a legitimate protective order. *International Products Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir.1963).[3] When the Supreme Court of Washington agreed with the position of the Second Circuit, the Supreme Court granted *certiorari* to resolve the conflict then existing between the circuits. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, ____, 104 S.Ct. 2199, 2205, 81 L.Ed.2d 17 (1984).

The Court's decision in *Seattle Times* clarifies both the applicability of the first amendment to protective orders issued in the civil discovery context, and the standard to be utilized in conducting the resulting constitutional analysis. Thus, the Court held that "information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if

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[3] Citing *Koons*, the Third Circuit has stated that "[i]t may well be ... that the parties and counsel, by taking advantage of or a part in the discovery process, implicitly waive their First Amendment rights freely to disclose or disseminate the information obtained through these processes." However, such statement was by way of dictum, characterized by the court as being assumed *arguendo* for the purposes of the appeal before it. *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir.1976). The court therefore regards the instant issue as not having been addressed by the Third Circuit.

ever, fall within the classes of unprotected speech identified by decisions of this Court." 104 S.Ct. at 2206. In *Seattle Times*, the Court held the first amendment clearly to be implicated, in light of the great degree of public interest in plaintiff Rhinehart, the leader of a religious group known as the Aquarian Foundation. Much greater is the public interest in this case, involving claims of liability against cigarette companies for failure to warn and other theories. *See Cipollone v. Liggett Group Inc.*, 593 F.Supp. 1146, 1149 (D.N.J. 1984) (summarizing complaint). *See also Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984) (documents unsealed in part because "[t]he public has a strong interest in obtaining the information contained in the court record. The subject of this litigation potentially involved the health of citizens who have an interest in knowing the accurate 'tar' and nicotine content of the various brands of cigarettes on the market."). Hence, there is no question but that some constitutional analysis must be undertaken here.

[7] The *Seattle Times* Court set forth the analysis to be conducted.

> The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing that question it is necessary to consider whether the "practice in question [furthers] an important or substantial governmental Interest" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413 [94 S.Ct. 1800, 1811, 40 L.Ed.2d 224] (1974).

104 S.Ct. at 2207. Such analysis, the Court concluded, required "no heightened First Amendment scrutiny," *id.* at 2209, since

the information at issue had been obtained only by virtue of court discovery processes, which processes are inherently private and may concern information "unrelated, or only tangentially related, to the underlying cause of action." 104 S.Ct. at 2207-08. The Court added that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* at 2208.

[8] The Supreme Court also simplified the resulting analysis by holding that, as a matter of law, "Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression." *Ibid.* It therefore remained there, and remains here, to decide only whether the protective orders at issue limited first amendment freedoms more than necessary or essential to protect the governmental interests furthered by Rule 26(c). The Supreme Court found there to be no violation of the first amendment, in light of the fact that the Supreme Court of Washington "found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law." The Court ended its Opinion by stating:

> We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

104 S.Ct. at 2209-10 (footnote omitted). Such statement of the Court's holding apparently motivated Justices Brennan and Marshall to concur separately, with a reminder that the courts must continue to decide whether, even if good cause is shown, the limitations on first amendment expression imposed by a protective order are no greater than necessary. 104 S.Ct. at 2210 (Brennan, J., concurring).

The *Seattle Times* decision has, of course, had a profound impact upon the litigation of issues such as the one now before the court. Thus, for example, *Halkin* has been recognized as no

longer "good law." *See Tavoulareas v. Washington Post Co.*, 737 F.2d 1170 (D.C.Cir. 1984) (en banc). Moreover, at least one court was forced to reconsider a prior opinion on the subject, and in so doing, to recognize that "the discussion in *Seattle Times* certainly removes much of the authority for the Court's discussion of the first amendment interests at play in pretrial discovery." *International Union v. Garner, supra*, 102 F.R.D. at 117. In general, *Seattle Times* has been utilized to justify the imposition of restraints on parties at various stages of litigation, *see, e.g., Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1206 (11th Cir.1985); *Miller v. Mecklenburg County*, 606 F.Supp. 488, 490 (W.D.N.C.1985); *United States v. Smith*, 602 F.Supp. 388, 394-97 (M.D.Pa.1984); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F.Supp. 621, 623 (D.D.C.1984), though others have refused to issue protective orders in spite of it. *See, e.g., United States v. Hooker Chemicals & Plastic Corp.*, 599 F.Supp. 655, 658 (W.D.N.Y.1984); *International Union v. Garner, supra*, 102 F.R.D. at 117. More importantly, courts have split on the meaning of the last passage in the *Seattle Times* majority opinion. Some have focused exclusively upon such passage in a manner indicating that, if a protective order passes muster under Rule 26(c), it must, of necessity, be constitutional. *See Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir.1984); *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1223-24 n. 4 (7th Cir.1984); *Tavoulareas, supra*, 737 F.2d at 1172-73; *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 566 (E.D.N.Y.1985). Others, however, have emphasized that *Seattle Times* requires a restriction to be no greater than necessary to protect the public interest, *see Michelson v. Daly*, 590 F.Supp. 261 (N.D.N.Y.1984), and, indeed, the Supreme Court cites *Seattle Times* for that very proposition. *See Wayte v. United States*, ____ U.S. ____, ____, 105 S.Ct. 1524, 1533, 84 L.Ed.2d 547 (1985).

The court finds the *Seattle Times* decision imprecise on this point. Its admonition that restrictions imposed by protective orders be no greater than necessary, 104 S.Ct. at 2207, is absent from the final formulation of its holding. *See Id.* at 2209-10. Such absence has one of two meanings: either the "good cause"

standard enunciated by Rule 26(c) of necessity takes into account the notion that protective orders are to be narrowly drawn, or one looks to "good cause" in the first instance, and, only if it is present, to the first amendment implications thereafter. In either event, the appropriate next step is an analysis of the instant Protective Order under Rule 26(c).

C. *The Rule 26(c) Analysis*

Federal Rule of Civil Procedure 26(c) states:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by court.

[9.10] The party seeking a protective order under this section bears the burden of proving its necessity. *See, e.g., In re E.E.O.C.*, 709 F.2d 392, 401, n. 7 (5th Cir.1983); *Penthouse*

*International, Ltd. v. Playboy Enterprises, Inc.*, 663 F.2d 371, 391 (2d Cir.1981); *United States v. Garrett*, 571 F.2d 1323, 1326 n. 3 (5th Cir.1978) (citing cases); *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 571 (E.D.N.Y.1985); *Niren v. Immigration and Naturalization Service*, 103 F.R.D. 10, 11 (D.Ore.1984); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., supra*, 529 F.Supp. at 890-91 (citing cases). *See generally* 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2035, at 264-65 (1970 and 1985 Supp.). Where, as here, the purpose underlying the protective order at issue is the protection of confidential materials, *see* Protective Order at 1 ("It appearing that the plaintiffs' demands for the production and inspection of documents and records may require the disclosure of confidential records and private information ..."), discharging such burden normally entails showing both that the information sought requires protection under the Rule, and that disclosure will result in clearly defined and serious injury. *See, e.g., Centurion Industries, Inc. v. Warren Steurer and Associates*, 665 F.2d 323, 325-26 (10th Cir.1981) (citing cases); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 954 n. 5 (8th Cir.), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1997, 60 L.Ed.2d 376 (1979); *Cutler v. Lewiston Daily Sun*, 105 F.R.D. 137, 140 (D.Maine 1985); *Zenith Radio, supra*, 529 F.Supp. at 889, 891 (citing cases); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D.Mich.1981) (citing cases); *Koster v. Chase Manhattan Bank, supra*, 93 F.R.D. at 479 (S.D.N.Y.1982). Once this burden is discharged, it generally shifts back to the party opposing the protective order to show why such order ought not be entered. *See generally* 8 C. Wright & A. Miller, *supra*, § 2043, at 301-02. *See, e.g., Centurion, supra*, 665 F.2d at 325-26.

[11] The court assumes the need for an "umbrella order" such as that sought to be entered here, and agrees with the Magistrate and the parties that such an order is the best way to handle litigation as complex as this. *See, e.g., Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1023-24 (D.C.Cir.1984), *vacated on other grounds*, 737 F.2d 1170 (D.C.1984) (en banc); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 36, 41, 44 (C.D.Calif.1984); *In re Agent Orange*

*Product Liability Litigation*, 96 F.R.D. 582, 585 (E.D.N.Y.1983) *Zenith Radio*, *supra*, 529 F.Supp. at 879 n. 18, 889, 915; *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, 18 Fed.R. Serv.2d 1251, 1252 (N.D.Cal.1974). *See Manual for Complex Litigation*, *reprinted in* 1 Moore's, *supra*. § 2.00-II(E)(2) (sample protective order). However, the prevailing law remains that defendants must bear the burden of demonstrating the necessity for each provision of such order. *See In re Agent Orange Product Liability Litigation*, *supra*, 104 F.R.D. at 568-70 (burden remains on party seeking continued protection from order in light of first amendment interest set forth in *Seattle Times*); *U.S. v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981) (movant failed to bear burden of proving need for protective order). Here, the reasons asserted are quite conclusory: the Magistrate states merely that "having this order in place will facilitate the efficacious production of documents and discovery of defendants to some extent and that it will streamline the litigation...." Transcript of Proceedings at 56. Defendants echo this conclusion, Brief of Defendant R.J. Reynolds at 10, 25; Brief at Defendant Liggett Group Inc. at 11, 26, 29; Brief of Defendant Loew's Theatres, Inc. at 2-4, asserting as additional reasons for the Order only that plaintiff's counsel ought not be allowed "to use this discovery as a bargaining tool with attorneys in other jurisdictions to assure New Jersey counsel's participation in such cases," Liggett Brief at 14-15, and that vacating the Order would impermissibly infringe defendants' right to petition government. Brief of Defendant Tobacco Institute at 6 n *. The court has considered these reasons in light of the applicable law, as set forth above, and, accordingly modifies the Protective Orders as follows.*

1. *Non-confidential information*

[12] Paragraph 2 of the Protective Order states that "*[a]ll* information produced or exchanged in the course of this civil

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* In the discussion which follows, the party seeking disclosures is denominated "plaintiffs" and that resisting it "defendants" for the sake of convenience, and in that such is the parties' current posture before this court. The Order itself speaks, correctly, in more general terms, allowing for the reversal of roles.

action ... shall be used solely for the purpose of this case." Order ¶ 2 (emphasis added). To this extent, the Order oversteps the bounds permitted by Rule 26(c), and consequently of the first amendment, by limiting the flow of information without any cause whatsoever. The Order will accordingly be altered to cover only confidential information.

2. *Designation of confidential materials*

As it now exists, the Protective Order allows defendants to designate as confidential any information as to which it has a "good faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto." Order ¶3.[5] No mechanism is created for plaintiffs to challenge this designation in the event of its misuse, except at the point of a proposed disclosure of such information "to any person, other than outside counsel and their employees or medical experts." Order ¶ 10. Then, defendants may consent to such disclosure or make application to the court to prohibit it. *Ibid.* Plaintiffs suggest a procedure to challenge confidentiality much earlier in the process, before material is labelled. Order ¶ 4. The court agrees that such procedure is required, and has modified paragraph three of the Order to require defendants to show good cause for any and all confidentiality designations. As revised, that paragraph allows defendants to designate information as confidential pending either an agreement to that effect with plaintiff, or the decision on a motion to that effect made by defendant within ten days of such designation. This system does not allow misuse of the confidentiality designation and places the burden of proving such confidentiality squarely upon defendants, as is required by Rule 26(c) and the first amendment. *See, e.g., In re Petroleum Products, supra,* 101 F.R.D. at 44 ("Umbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella protection should not substantively expand the protection provided by Rule 26(c)(7) or countenanced by the common law of

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[5] The court agrees with defendants that confidential information may be contained in depositions as well as printed matter.

access. To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right."); *Zenith Radio, supra*, 529 F.Supp. at 893, 915 (order does not shift the burden of showing confidentiality, leaving it, "as the Constitution requires, on the party seeking protection."). *See also In re Agent Orange, supra*, 104 F.R.D. at 574 (defendants bear burden of showing why information should be designated confidential in the first instance). *But see In re Agent Orange, supra*, 96 F.R.D. at 585 (proponents of dissemination must indicate which documents they wish to disseminate, at which point burden is on opponents of dissemination to show good cause for existence of protective order); *Chambers Development Co. v. Browning-Ferris Industries*, 104 F.R.D. 133, 136 (W.D.Pa.1985) (party objecting to confidentiality must apply to the court). *See generally* Marcus, *supra*, 69 Cornell L.Rev. at 18 ("Usually, [stipulated protective orders] permit any party to challenge the confidentiality designation and obtain a ruling on the issue. At that point the burden of showing that the designated materials are confidential falls on the producing party.") (footnotes omitted).[6]

[13,14] To allow information to become presumptively confidential without affording plaintiffs an opportunity to disagree with that designation and then to bear the burden of mounting a challenge, would run afoul of the basic burden-shifting approach mandated by Rule 26(c). As such, it violates the first amendment after *Seattle Times*. Nor is the current Order necessary to protect the interest asserted by defendants, particularly where, as here, the information at issue is of great public interest and could be utilized to render future litigation far more efficient. Finally, the court notes that by requiring defendants to shoulder the burden of proving confidentiality in the first instance, it changes the Protective Order but little, for defendants were

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[6] This article was cited with approval by the Supreme Court in *Seattle Times* 104 S.Ct. at 2208.

required to withstand a confidentiality challenge at a later stage even under defendants' version of the Order. *See* Order ¶10.[7]

3. *Use of Confidential Material*

[15,16] Once designated confidential, information disclosed in discovery may, under the Order as it now exists, be inspected only by counsel or their experts, for purposes of the instant litigation, Order ¶6, absent consent. Order ¶10. The court agrees that, assuming such information is, in fact, confidential within the meaning of Rule 26(c)(7),[8] and not merely undiscovered prior to the instant litigation, *see supra*, at 2-4, the protections of paragraph ten ought to apply. *See Tavoulareas, supra*, 724 F.2d at 1013 n. 6 ¶ 9. However, it does not agree that it is either justified, or wise, to restrict even confidential materials to use by plaintiffs' attorneys in this litigation; therefore, the court will allow plaintiffs' counsel to utilize such materials in other

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[7] The court hereby denies plaintiffs' motion to vacate paragraph 9 of the Order. Hence, in the event of inadvertent disclosure, defendants will not have waived their claim of confidentiality, unless, of course, subsequent disclosure by plaintiffs or others renders the issue moot, and confidentiality impossible. *See C & C Products, Inc. v. Messick*, 700 F.2d 635 (11th Cir.1983) Otherwise, defendants may designate information as confidential at any time, thereby triggering the ten-day time period contained in paragraph three of the Order, as here revised by the court.

[8] One court has listed the considerations pertinent to a determination of whether something is a trade secret as including:

> (1) the extent to which information is known outside the business; (2) the extent to which information is known to those inside the business; (3) the measures taken to guard the secrecy of the information; and (4) the value of the information to the business and its competitors.

*Reliance Ins. Co. v. Barron's*, 428 F.Supp. 200, 203 (S.D.N.Y.1977), citing *United States v. IBM*, 67 F.R.D. 40, 46 (S.D.N.Y.1975). *See also In re Agent Orange, supra*, 104 F.R.D. at 574-75 (discussing requirement of competitive harm) (citing cases).

These considerations are certainly relevant here, where the parties' concern is, or ought to be at least in part, competitive injury. Of course, Rule 26(c) seeks to protect parties against "embarrassment" as well. *Rhinehart, supra*, 104 S.Ct. at 2208 n. 21; moreover, factors such as defendants' constitutional right to petition government are also appropriate for consideration.

litigation in which they are participants, as has been recognized as wise in many other cases. *See, e.g., Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 550-51 (N.D.Texas 1985); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D.Colo.1982) ("The plaintiffs' attorneys' discovery information exchange group reduces the effort and expense inflicted on all parties, including [defendant] by repetitive and unnecessary discovery. In this era of ever expanding litigation expense, any means of minimizing discovery costs improves the accessibility and economy of justice. If, as asserted, a single design defect is the cause of hundreds of injuries, then the evidentiary facts to prove it must be identical, or nearly so, in all cases. Each plaintiff should not have to undertake to discovery [sic] anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel. Efficient administration of justice requires that courts encourage, not hamstring, information exchanges such as that here involved"); *Carter-Wallace v. Hartz Mountain Industries*, 92 F.R.D. 67, 69-70 (S.D.N.Y.1981), citing *Olympic Refining Co. v. Carter*, 332 F.2d 260, 266 (9th Cir.), *cert. denied*, 379 U.S. 900, 85 S.Ct. 186, 13 L.Ed.2d 175 (1964); *Hooker Chemicals, supra*, 90 F.R.D. at 426; *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 n. 1 (N.D.Ga.1980); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153-59 (W.D.Texas 1980); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y.1973) ("unless it can be shown that the discovering party is exploiting the instant litigation solely to assist in other litigation before a foreign forum, federal courts do allow full use of the information in other forums") (citing cases); *Williams v. Johnson & Johnson*, 50 F.R.D. 31, 33 (S.D.N.Y.1970). *See also Wilk v. American Medical Association*, 635 F.2d 1295, 1299-01 (7th Cir. 1980); citing *American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979). *See generally* Marcus, *supra*, 69 Cornell L.Rev. at 41-46; E. Sherman and S. Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 284-91 (1982); Manual for Complex Litigation, *supra*, § 3.11-I. Indeed, at least one court has permitted the very evil here cited by

defendants – the sale of discovery materials. *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 81 F.R.D. 482, 484-85 (E.D.Mich. 1979), *aff'd*, 664 F.2d 114 (1981). The court here finds that to allow plaintiffs' counsel to utilize the discovery from these matters in other cases in which they are involved is a particularly unoppressive application of this precedent, and one which will allow the court to maintain some control over the information disclosed while at the same time preventing the kind of duplication that would undermine the purpose of the Federal Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1.[9] The Protective Order will be modified accordingly.[10]

(4) *Other*

Nowhere in defendants' papers does there appear opposition to plaintiffs' application to vacate paragraph thirteen of the Order. It will therefore be vacated. However, the court wishes to maintain the flexibility allowed by paragraphs fifteen and sixteen of the Order. Plaintiffs' application to vacate them will be denied.

## CONCLUSION

The court concludes that, under the circumstances of this case, the Protective Order entered by the Magistrate was not justified by "good cause" under Federal Rule of Civil Procedure 26(c), and therefore constituted a violation of the first amendment, under *Seattle Times*. In so ruling, the court recognizes that the Supreme Court has abandoned the notion that discovery should be presumed "open". *See Seattle Times*, 104 S.Ct. at 2207-08 and n. 19. Notwithstanding this retrenchment, the court here finds that defendants have failed to bear their burden of showing that, without this Order, they would be harmed by the dissemination of nonconfidential documents, or confidential documents

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[9] However, the court endorses neither the wholesaling of such discovery nor the monopolization of information by plaintiffs' counsel.

[10] Paragraph 7 will also be modified, to allow experts to utilize information gained in one proceeding in others in which they, or plaintiff's counsel, are participants.

disclosed within narrowly defined parameters designed to expedite this litigation. Such burden is also one, the court finds, which defendants ought to continue to bear, in order to minimize abuse and maximize the free flow of information which is a matter of high public interest.

Not all information obtained through the discovery process should be available for publication beyond the litigation itself. However, before disclosure is limited or prohibited, a need for such restriction must be established. The burden of establishing such need should fall upon the party asserting it. To conclude otherwise would unduly restrict the free flow of information mandated by the first amendment. In a case such as this in which the public has a substantial interest, the court is reluctant to inhibit such disclosure absent a showing that there is good cause to do so. What are the risks of smoking; what the tobacco industry knew of those risks; and what action it took or did not take with that knowledge are matters of great public concern. It is difficult to envision that any of those matters involve "secrets" in the traditional sense, worthy of protection against public scrutiny. Indeed they may be secrets in the sense that the industry would prefer them to remain confidential, but not in the sense that their concealment from the press and public would be consistent with the first amendment.

Litigants are entitled to prove that information released through the compulsion of discovery proceedings should not be made public, and they are afforded the opportunity to do so. However, absent such showing, information gleaned through discovery should be made available, particularly when the subject matter pertains to issues which affect the health and well-being of millions of persons.

**Order of the Court of Appeals dated July 9, 1987**

ANTONIO CIPOLLONE,
Individually and as the Executor of
the Estate of Rose D. Cipollone,

Plaintiff-Respondent,

— v. —

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants-Petitioners.

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SUSAN HAINES,
as Administratrix ad Prosequendum
and Executrix of the Estate of Peter F. Rossi,

Plaintiff-Respondent,

— v. —

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
R. J. REYNOLDS TOBACCO CO.,
THE TOBACCO INSTITUTE, and
LOEW'S THEATRES, INC.,

Petitioners,

—v.—

HONORABLE H. LEE SAROKIN,
United States District Judge,
District of New Jersey,

Nominal Respondent.

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No. 87-5014

United States Court of Appeals,
Third Circuit
Decided July 9, 1987

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**SUR PETITION FOR REHEARING**

Before: GIBBONS, *Chief Judge*,
SEITZ, HIGGINBOTHAM, SLOVITER,
BECKER, STAPLETON, MANSMANN,
GREENBERG and GARTH, *Circuit Judges*

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The petition for rehearing filed by Philip Morris Incorporated, Liggett Group, Inc., Lorillard, Inc., R. J. Reynolds Tobacco Co. and The Tobacco Institute in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant panel rehearing for the reasons set forth in his panel dissent and particularly because he believes it is a matter for the court's attention when compliance has not been had with an earlier mandate of the court.

By the Court,

/s/ Gibbons

Chief Judge

Dated: July 9, 1987

**Order of the Court of Appeals**
**Dated June 8, 1987**

ANTONIO CIPOLLONE,
Individually and as the Executor of
the Estate of Rose D. Cipollone,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP, INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants-Petitioners.

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SUSAN HAINES,
as Administratrix ad Prosequendum
and Executrix of the Estate of Peter F. Rossi,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
R. J. REYNOLDS TOBACCO CO.,
THE TOBACCO INSTITUTE, and
LOEW'S THEATRES, INC.,

Petitioners,

—v.—

HONORABLE H. LEE SAROKIN,
United States District Judge,
District of New Jersey,

Nominal Respondent.

---

No. 87-5014

United States Court of Appeals,
Third Circuit
Decided June 8, 1987

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Before: GIBBONS, *Chief Judge*,
SEITZ and GARTH, *Circuit Judges*

**ORDER**

Upon consideration of the petition for writ of mandamus and for reassignment, the answer of respondents, and oral argument by counsel, March 2, 1987,

It is ordered and adjudged by this Court that the petition for writ of mandamus and for reassignment be, and the same is hereby denied in accordance with the opinion of this Court. Costs taxed against petitioners.

For the Court,

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Clerk

June 8, 1987

**Order of the District Court dated December 18, 1986**

ANTONIO CIPOLLONE,
Individually and as Executor of the
Estate of Rose D. Cipollone,

Plaintiff,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants.

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SUSAN HAINES,
as Administratrix ad Prosequendum
and Executrix of the Estate of Peter F. Rossi,

Plaintiff,

—v.—

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants.

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Nos. 83-2864 and 84-678

United States District Court,
District of New Jersey
Decided December 18, 1986

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Before: SAROKIN, *District Judge*

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This matter having come before the court by Writ of Mandamus dated March 12, 1986; and the court having considered the submissions of the parties and the arguments of counsel; and for the reasons expressed in the Opinion of the court of November 12, 1986; and for good cause shown;

It is hereby on this 18 day of December, 1986

ORDERED that the Protective Order of Magistrate Cowen dated March 25, 1985 be and it hereby is vacated; and it is

FURTHER ORDERED that:

1. All counsel and their employees shall be and are hereby prohibited and enjoined from disclosing to or otherwise discussing with any other person any confidential information (as herein defined), except as provided hereafter.

2. All "confidential" information produced by defendants in the course of this civil action or any appeal arising therefrom (the "litigation") may be used in all related or similar cases subject to the terms and conditions of this order.

3. Any plaintiff seeking to use "confidential or non-confidential information from this matter shall seek leave of the court before whom that matter is pending.

4. "Confidential information" as used herein means any information which is designated as "confidential" whether it be a document, information contained in a document, information revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as confidential only upon the good-faith belief that the information falls within the scope of "confidential" information under the Federal Rules of Civil Procedure and the precedents thereto, including this Court's opinions in this case. Counsel shall have the right to challenge, by motion, the designation of any document as "confidential" and, if the objection is sustained, sanctions may be imposed upon the party making the designation, ~~if not made~~ in good faith, including attorney's fees and the reasonable expenses incurred by counsel pursuant to Fed. R. Civ. P. 26(g).

5. Documents containing confidential information shall be designated as confidential by placing the word "CONFIDENTIAL" or the following label (or a substantial equivalent) on the original of the document:

"CONFIDENTIAL"

"PAGES/PARAGRAPHS/LINES _____ THROUGH _____ OF THIS DOCUMENT ARE SUBJECT TO A COURT ORDER AND THIS DOCUMENT AND ITS CONTENTS SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER."

In lieu of placing this label on the original of the documents, the party may place the label on the copies of the documents that are produced.

6. Confidential information which is disclosed at a deposition must be designated as confidential by indicating on the record at the deposition, or in writing to all counsel within ten (10) days following receipt of the deposition transcript by counsel so designating, that the testimony is confidential and subject to the provisions of this court order with regard to confidentiality.

7. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and defendants in this litigation, or where authorized in other litigation, any lawyers specifically employed by them in connection with the litigation and any employee of such counsel assisting them; and

(b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation or where authorized in other litigation.

8. Each person, other than those described in Section 7(a), to whom designated confidential information or documents are

to be disclosed shall, prior to such disclosure, agree in writing under oath or attestation to the following:

> I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of , 1986, in *Haines v. Liggett Group Inc., et al.*, the United States District Court for the District of New Jersey; that I have been given a copy of and have read the Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except in accordance with the Protective Order such information or documents, and that such information or documents shall be used only for the purpose of the legal proceeding in which they were produced. I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of Court, imposed by the Court, for such a failure.

Copies of this attestation shall be filed under seal with the court.

9. No summary or copy of any designated confidential information or document shall be made by any person, other than at the express direction of the attorney to whom disclosure was first made. Any such summary or copy shall be subject to the terms of this Protective Order to the same extent as the information or document from which such summary or copy is made.

10. Inadvertent disclosure of any document or other information during discovery in this action shall be without prejudice

to any claims that such material is confidential, privileged or otherwise protected from discovery within the meaning of Federal Rule of Civil Procedure 26(b)(3), and no party shall be held to have waived any rights by such inadvertent disclosure. Any document or information so produced and subject to a subsequent claim of privilege, work product or other protection, shall be returned immediately to the appropriate party, and such document or information shall not be introduced into evidence in this or any other proceeding by any person without either (i) the consent of said party, or (ii) order of the Court, nor will such document or information be subject to production (other than *in camera*) in any proceeding by virtue of the fact that it was inadvertently produced in this proceeding.

11. Prior to the disclosure of any confidential information to any person, other than counsel of record and their employees or experts, the party seeking disclosure shall advise counsel and the Court, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose, for the purposes of this litigation, said confidential information. Within twenty (20) days after such advise, counsel to whom notice is given may give written permission for such disclosure or may give written notice to advise counsel of an application to this Court for an Order prohibiting the proposed disclosure. No such disclosure shall take place until the Court has acted upon such application. In the absence of notice of such application, the party seeking disclosure may proceed, after expiration of said twenty (20) days with the disclosure proposed.

12. The Clerk of this Court is directed to maintain under seal all documents and transcripts of deposition testimony filed in this litigation which have been designated, in whole or in part, as "confidential" pursuant to the terms of this order.

13. In the event that any information or documents subject to the confidentiality restrictions of this Protective Order is used in pretrial depositions, briefs, or other documents filed with the Court, or is referred to in any hearing before the Court, such use or reference shall be made under seal and bear the legend:

"THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER: THE CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT"

and/or be reviewed by the Court *in camera* with the public excluded.

14. Nothing herein shall be deemed to restrict in any manner the use by any party of its own documents or materials.

14a. Within forty-five (45) days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all confidential documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of confidential documents, and all information and notes derived from them, also shall be destroyed. Compliance with this provision shall be certified to by all counsel for the obtaining party or parties.

15. Nothing herein shall affect the right of any party to seek additional protection against the disclosure of any documents or materials.

16. Any party may apply to this court at any time, upon proper notice for a modification of this Protective Order with respect to the handling or designation of any document or for any other purpose.

17. This order shall be binding upon any future party to this litigation and any other party utilizing such discovery pursuant to the authority of any other court, and all proceedings arising under it are referred to the magistrate for disposition.

18. Anything to the contrary notwithstanding, confidential information may may be delivered to counsel in other related or similar actions provided the court in such action permits same

and provided further that the conditions of confidentiality imposed herein are imposed in said action.

19. Defendants' motion to stay the within order for 21 days from the date hereof is granted.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

**Order of the Court of Appeals dated March 12, 1986**

ANTONIO CIPOLLONE,
Individually and as the Executor of
the Estate of Rose D. Cipollone,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Petitioners,

—v.—

HONORABLE H. LEE SAROKIN
United States District Judge,
District of New Jersey,

Nominal Respondent.

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SUSAN HAINES,
as Administratrix ad Prosequendum and
Executrix of the Estate of Peter F. Rossi,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and LOEW'S CORPORATION,

Petitioners,

—v.—

HONORABLE H. LEE SAROKIN
United States District Judge,
District of New Jersey

Nominal Respondent.

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ANTONIO CIPOLLONE,
Individually and as the Executor of the
Estate of Rose D. Cipollone,

Appellee,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
LOEW'S CORPORATION, and
LOEW'S THEATRES, INC.,

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Appellants.

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SUSAN HAINES,
as Administratrix ad Prosequendum and
Executrix of the Estate of Peter F. Rossi,

Appellee,

—v.—

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Appellants.

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Nos. 85-3423, 85-3424,
85-5529, 85-5530

United States Court of Appeals
Third Circuit
Decided March 12, 1986

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Before: HIGGINBOTHAM, BECKER and
STAPLETON, Circuit Judges

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**ORDER**

Upon consideration of the Petition for Writ of Mandamus or Prohibition, the briefs of petitioners and respondent and after hearing oral argument by counsel September 26, 1985,

It is O R D E R E D, A D J U D G E D and D E C R E E D by this Court that the prayer of the petitioners is hereby granted and the Clerk of this Court is directed to issue a writ of mandamus in accordance with the opinion of this Court.

It is further ordered and adjudged that the appeals docketed at Nos. 85-5529 and 85-5530 which are taken from the orders entered July 17, 1985, in D.N.J. Civ. Nos. 83-2864 and 84-0678, be, and the same are hereby dismissed for lack of appellate jurisdiction. The mandate in appeals No. 85-5529 and 85-5530 shall issue forthwith.

Costs taxed against the respondents in Nos. 85-3423 and 85-3424 and against Appellants in Nos. 85-5529 and 85-5530.

By the Court

/s/ Becker
Circuit Judge

Dated: March 12, 1986

**Writ of Mandamus Issued by the Court of Appeals dated March 12, 1986**

ANTONIO CIPOLLONE,
Individually and as the Executor of
the Estate of Rose D. Cipollone,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Petitioners,

—v.—

HONORABLE H. LEE SAROKIN,
United States District Judge,
District of New Jersey,

Nominal Respondent.

---

SUSAN HAINES,
as Administratrix ad Prosequendum
and Executrix of the Estate of Peter F. Rossi,

Plaintiff-Respondent,

—v.—

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants-Petitioners.

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LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and LOEW'S CORPORATION,

Petitioners,

—v.—

HONORABLE H. LEE SAROKIN,
United States District Judge,
District of New Jersey,

Nominal Respondent.

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Nos. 85-3423 and 85-3424

United States Court of Appeals
Third Circuit
Decided March 12, 1986

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## WRIT OF MANDAMUS

UNITED STATES OF AMERICA, THIRD JUDICIAL CIRCUIT: SS

To The Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, GREETINGS:

Whereas, the Honorable H. Lee Sarokin by orders entered July 17, 1985, in D.N.J. Civ. Nos. 83-2864 and 84-0678, substantially revised the magistrate's protective orders which were before him on appeal as described in the opinion of this Court,

Whereas, the Liggett Group, Philip Morris Incorporated, and Loew's Theatres, Inc. filed petitions for writ of mandamus or prohibition and notices of appeal from these orders, requesting this Court to direct the said Honorable H. Lee Sarokin to enter a protective order prohibiting the dissemination to the public or to counsel in similar cases of any of the documents they had produced or would produce during discovery, and in support of the petition and appeal the petitioners filed a brief on August 27, 1985; and,

Whereas, the respondent has filed a brief on September 17, 1985; and,

Whereas this Court having heard oral argument by counsel September 26, 1985, and having rendered its opinion and the same being filed on this date, in which the Court having directed that the appeals be dismissed and having further directed that the prayer of petitioners for a Writ of Mandamus be granted; and

Whereas the Court on this date has entered an order directing the Clerk of this Court to issue a writ of mandamus in accordance with its opinion;

Now therefore the Honorable H. Lee Sarokin is hereby *REQUIRED* and *DIRECTED*, immediately after receipt of this writ, and without unreasonable delay to vacate the said orders entered on July 17, 1985, and to reconsider the appeal from the magistrate's protective orders in a manner consistent with the opinion of this Court.

Clerk, United States
Court of Appeals for
The Third Circuit

Dated: March 12, 1986

**Order of The District Court**
**dated July 17, 1985**

ROSE D. CIPOLLONE and
ANTONIO CIPOLLONE,

Plaintiffs,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants.

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No. 83-2864

United States District Court,
District of New Jersey
Decided July 17, 1985

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Before: SAROKIN, *District Judge*

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This matter having come before the court on plaintiffs' motion to vacate the Order of the Honorable Robert E. Cowen, United States Magistrate, dated March 25, 1985; and the court having considered the submissions of the parties and the arguments of counsel; and for the reasons expressed in the Opinion of the court even dated herewith; and for good cause shown;

It is on this 17 day of July, 1985,

ORDERED that the Protective Order of Magistrate Cowen dated March 25, 1985 be and it hereby is vacated; and it is further

ORDERED that:

1. All counsel and their employees shall be and are hereby prohibited and enjoined from disclosing to or otherwise discussing with any other person any confidential information (as herein defined), except as provided hereafter.

2. All "confidential" information produced by defendants in the course of this civil action or any appeal arising therefrom (the "litigation") may be used in all cases in which plaintiffs' counsel in this action are counsel of record.

3. "Confidential information" as used herein means any document which is found by the court or agreed by the parties to be "confidential," whether it be the document, information contained in the document, information revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as "claimed confidential" only upon the good faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto. If defendants claim that a particular document is confidential, it shall be the defendants' burden to bring a motion before the court to determine whether the document in question is a confidential document under the Federal Rules of Civil Procedure and the precedents thereto. Failure of defendants to bring such a motion within ten days of advising plaintiffs' counsel of any claim of confidentiality shall constitute a waiver of any claim of confidentiality as to the document in question and permit removal of the claim of confidentiality. Should the court determine that the defendants have misused the "claimed confidential" designation, it will consider awards of costs including counsel fees incurred as a result of the misuse of said designation.

4. Documents determined to be confidential, either by the court or by agreement of the parties, shall be designated as confidential by placing the following label (or a substantial equivalent) on the original document:

"CONFIDENTIAL"

"PAGES/PARAGRAPHS/LINES _____ THROUGH _____ OF THIS DOCUMENT ARE SUBJECT TO A COURT ORDER AND THIS DOCUMENT AND THEIR CONTENTS SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER."

In lieu of placing this label on the original of the documents, the party may place the label on the copies of the documents that are produced.

5. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and defendants in this or other litigation, any lawyers specifically employed by them in connection with this or other litigation and any employee of such counsel assisting with this this [sic] or other litigation;

(b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation.

6. Each person, other than those described in ¶ 5(a), to whom designated confidential information or documents are to be disclosed shall, prior to such disclosure, agree in writing under oath or attestation to the following:

I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of _____, 1985 in *Cipollone v. Liggett Group, Inc., et al.*, the United States District Court for the District of New Jersey; that I have been given a copy of and have read the Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except

in accordance with the Protective Order, such information or documents, and that such information or documents shall be used only for the purposes of the legal proceedings in which they were produced or in which I may appear as a witness or expert and in which plaintiffs' counsel in this action are counsel of record. I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of court, imposed by the court, for such a failure.

Copies of this attestation shall be filed under seal with the court.

7. No summary or copy of any designated confidential information or document shall be made by any person, other than at the express direction of the attorney to whom disclosure was made. Any such summary or copy shall be subject to the terms of this Protective Order to the same extent as the information or document from which such summary or copy is made.

8. Inadvertent disclosure of any document or other information during discovery in this action shall be without prejudice to any claims that such material is confidential, privileged or otherwise protected from discovery within the meaning of Federal Rule of Civil Procedure 26(b)(3), and no party shall be held to have waived any rights by such inadvertent disclosure. Any document or information so produced and subject to a subsequent claim of privilege, work product or other protection, shall not be introduced into evidence in this or any other proceeding by any person without either (i) the consent of said party, or (ii) order of the court, nor will such document or information be subject to production (other than *in camera*) in any proceeding by virtue of the fact that it was inadvertently produced in this proceeding.

9. Prior to the disclosure of any confidential information to any person, other than counsel and their employees or experts, the party seeking disclosure shall advise the court and counsel, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose said confidential information. Within twenty days after such advice, counsel to whom notice is given may give written permission for such disclosure or may give written notice to adverse counsel on an application to this court for an order prohibiting such disclosure. No such disclosure shall take place until the court has acted on such application. In the absence of notice of such application, the party seeking disclosure may proceed, after expiration of said twenty days with the disclosure proposed.

10. The Clerk of this court is directed to maintain under seal all documents and transcripts of deposition testimony filed in this litigation which have been designated, in whole or in part, as "confidential" pursuant to the terms of this Order.

11. In the event that any information or documents subject to the confidentiality restrictions of this Protective Order is used in pretrial depositions, briefs, or other documents filed with the court, or is refered [sic] to in any hearing before the court, such use or reference shall be made under seal and bear the legend,

> "THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIALS COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER: THE CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT."

and/or be reviewed by the court *in camera* with the public excluded.

12. Nothing herein shall be deemed to restrict in any manner the use by any party of its own document or materials.

13. Nothing herein shall affect the right of any party to seek additional protection against the disclosure of any documents or materials.

14. Any party may apply to this court at any time, upon proper notice, for a modification of this Protective Order with respect to the handling or designation of any document or for any other purpose.

15. This Order shall be binding upon any future parties to this litigation and all proceedings arising under it are referred to the magistrate for disposition.

/s/ H. Lee Sarokin

H. LEE SAROKIN, U.S.D.J.

**Order of the District Court dated March 25, 1985**

ROSE D. CIPOLLONE and
ANTONIO CIPOLLONE,

Plaintiffs,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED, and
LOEW'S THEATRES, INC.,

Defendants.

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No. 83-2864 SA

United States District Court,
District of New Jersey
Decided March 25, 1985

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PROTECTIVE ORDER

It appearing that the plaintiffs' demands for the production and inspection of documents and records may require the disclosure of confidential records and private information, which should otherwise remain confidential and the private property and information of the parties;

And it further appearing that the confidential business records and private information of the parties should be given the protection of an order of this Court to prevent injury to and invasion of the confidential property of the parties by reason of any

disclosure not otherwise necessitated by the parties' lawful interests in this litigation only, and good cause appearing;

It is hereby ORDERED on this 25 day of March 1985 that:

1. All counsel and their employees shall be and are hereby prohibited and enjoined from disclosing to or otherwise discussing with any other person any confidential information (as herein defined), except as provided hereafter.

2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.

3. "Confidential information" as used herein means any information which is designated as "confidential," whether it be a document, information contained in a document, information revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as confidential only upon the good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.

4. Documents containing confidential information shall be designated as confidential by placing the word "CONFIDENTIAL" or the following label (or a substantial equivalent) on the original of the document:

"CONFIDENTIAL"

"PAGES/ PARAGRAPHS/ LINES ____ THROUGH ____ OF THIS DOCUMENT ARE SUBJECT TO A COURT ORDER AND THIS DOCUMENT AND ITS CONTENTS SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER."

In lieu of placing this label on the original of the documents, the party may place the label on the copies of the documents that are produced.

5. Confidential information which is disclosed at a deposition must be designated as confidential by indicating on the record at the deposition, or in writing to all counsel within ten (10) days following receipt of the deposition transcript by counsel so designating, that the testimony is confidential and subject to the provisions of this Court Order with regard to confidentiality.

6. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and defendants in this litigation, any lawyers specifically employed by them in connection with the litigation and any employee of such counsel assisting with this litigation; and

(b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation.

7. Each person, other than those described in Section 6(a), to whom designated confidential information or documents are to be disclosed shall, prior to such disclosure, agree in writing under oath or attestation to the following, a copy of which shall forthwith be furnished to all counsel:

> I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of , 1985, in *Cipollone v. Liggett Group, Inc., et al.*, the United States District Court for the District of New Jersey; that I have been given a copy of and have read the Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except in accordance with the Protective Order, such information or documents, and that such information or documents shall be used only

> for the purposes of the legal proceeding in which they were produced. I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of court, imposed by the Court, for such a failure.

Copies of this attestation shall be served upon all counsel prior to such disclosure; in lieu of such service, copies of the attestation signed by medical experts may be filed under seal with the Court, for the period prior to the identification of such experts in pre-trial discovery.

8. No summary or copy of any designated confidential information or document shall be made by any person, other than at the express direction of the attorney to whom disclosure was first made. Any such summary or copy shall be subject to the terms of this Protective Order to the same extent as the information or document from which such summary or copy is made.

9. Inadvertent disclosure of any document or other information during discovery in this action shall be without prejudice to any claims that such material is confidential, privileged or otherwise protected from discovery within the meaning of Federal Rule of Civil Procedure 26(b)(3), and no party shall be held to have waived any rights by such inadvertent disclosure. Any document or information so produced and subject to a subsequent claim of privilege, work product or other protection, shall be returned immediately to the appropriate party, and such document or information shall not be introduced into evidence in this or any other proceeding by any person without either (i) the consent of said party, or (ii) by order of the Court, nor will such document or information be subject to production (other than *in camera*) in any proceeding by virtue of the fact that it was inadvertently produced in this proceeding.

10. Prior to the disclosure of any confidential information to any person, other than outside counsel and their employees or medical experts, the party seeking disclosure shall advise counsel and the Court, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose, for the purposes of this litigation, said confidential information. Within twenty (20) days after such advice, counsel to whom notice is given may give written permission for such disclosure or may give written notice to adverse counsel of an application to this Court for an order prohibiting the proposed disclosure. No such disclosure shall take place until the Court has acted upon such application. In the absence of notice of such application, the party seeking disclosure may proceed, after expiration of said twenty (20) days with the disclosure proposed.

11. The Clerk of this Court is directed to maintain under seal all documents and transcripts of deposition testimony filed in this litigation which have been designated, in whole or in part, as "confidential" pursuant to the terms of this Order.

12. In the event that any information or documents subject to the confidentiality restrictions of this Protective Order is used in pre-trial depositions, briefs, or other documents filed with the Court, or is referred to in any hearing before the Court, such use or reference shall be made under seal and bear the legend:

> "THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER: THE CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT."

and/or be reviewed by the Court *in camera* with the public excluded.

13. Within forty-five (45) days after the final adjudication or settlement of all claims in this case, counsel for the parties either

shall return all documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of documents, and all information and notes derived from them, also shall be destroyed. Compliance with this provision shall be certified to by all counsel for the obtaining party or parties.

14. Nothing herein shall be deemed to restrict in any manner the use by any party of its own documents or materials.

15. Nothing herein shall affect the right of any party to seek additional protection against the disclosure of any documents or materials.

16. Any party may apply to this Court at any time, upon proper notice, for a modification of this Protective Order with respect to the handling or designation of any document or for any other purpose.

17. This Order shall be binding upon any future party to this litigation.

/s/ Robert E. Cowen

Robert E. Cowen, U.S.M.

**Order Of The District Court**
**dated March 25, 1985**

SUSAN HAINES,
as Administratrix ad Prosequendum and
Executrix of the Estate of Peter F. Rossi,

Plaintiff,

—v.—

LIGGETT GROUP INC.,
LOEW'S THEATRES, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,

Defendants.

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No. 84-678

United States District Court,
District of New Jersey
Decided March 25, 1985

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**PROTECTIVE ORDER**

It appearing that the plaintiff's demands for the production and inspection of documents and records may require the disclosure of confidential records and private information, which should otherwise remain confidential and the private property and information of the parties;

And it further appearing that the confidential business records and private information of the parties should be given the protection of an order of this Court to prevent injury to and invasion of the confidential property of the parties by reason of any disclosure not otherwise necessitated by the parties' lawful interests in this litigation only, and good cause appearing;

IT IS hereby ORDERED on this 25 day of March, 1985 that:

1. All counsel and their employees shall be and are hereby prohibited and enjoined from disclosing to or otherwise discussing with any other person any confidential information (as herein defined), except as provided hereafter.

2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.

3. "Confidential information" as used herein means any information which is designated as "confidential," whether it be a document, information contained in a document, information revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as confidential only upon the good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.

4. Documents containing confidential information shall be designated as confidential by placing the word "CONFIDENTIAL" or the following label (or a substantial equivalent) on the original of the document:

"CONFIDENTIAL"

"PAGES/ PARAGRAPHS/ LINES ____ THROUGH ____ OF THIS DOCUMENT ARE SUBJECT TO A COURT ORDER AND THIS DOCUMENT AND THEIR CONTENTS SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER."

In lieu of placing this label on the original of the documents, the party may place the label on the copies of the documents that are produced.

5. Confidential information which is disclosed at a deposition must be designated as confidential by indicating on the record

at the deposition, or in writing to all counsel within 10 days following receipt of the deposition transcript by counsel so designating, that the testimony is confidential and subject to the provisions of this court order with regard to confidentiality.

6. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and defendants in this litigation, any lawyers specifically employed by them in connection with the litigation and any employee of such counsel assisting with this litigation;

(b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation.

7. Each person, other than those described in §6(a), to whom designated confidential information or documents are to be disclosed shall, prior to such disclosure, agree in writing under oath or attestation to the following, a copy of which shall forthwith be furnished to all counsel:

> I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of , 1985, in *Haines v. Liggett Group, Inc., et al.*, the United States District Court for the District of New Jersey; that I have been given a copy of and have read the Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except in accordance with the Protective Order, such information or documents, and that such information or documents shall be used only for the purposes of the legal proceeding in which they were produced. I further agree

> and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of court, imposed by the Court, for such a failure.

Copies of this attestation shall be served upon all counsel prior to such disclosure; in lieu of such service, copies of the attestaion signed by medical experts may be filed under seal with the court, for the period prior to the identification of such experts in pre-trial discovery.

8. No summary or copy of any designated confidential information or document shall be made by any person, other than at the express direction of the attorney to whom disclosure was first made. Any such summary or copy shall be subject to the terms of this Protective Order to the same extent as the information or document from which such summary or copy is made.

9. Inadvertent disclosure of any document or other information during discovery in this action shall be without prejudice to any claims that such material is confidential, privileged or otherwise protected from discovery within the meaning of Federal Rule of Civil Procedure 26(b)(3), and no party shall be held to have waived any rights by such inadvertent disclosure. Any document or information so produced and subject to a subsequent claim of privilege, work product or other protection, shall be returned immediately to the appropriate party and such document or information shall not be introduced into evidence in this or any other proceeding by any person without either (i) the consent of said party or (ii) by order of the Court, nor will such document or information be subject to production (other than *in camera*) in any proceeding by virtue of the fact that it was inadvertently produced in this proceeding.

10. Prior to the disclosure of any confidential information to any person, other than outside counsel and their employees or

medical experts, the party seeking disclosure shall advise counsel and the Court, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose, for the purposes of this litigation, said confidential information. Within twenty (20) days after such advice, counsel to whom notice is given may give written permission for such disclosure or may give written notice to adverse counsel of an application to this Court for an Order prohibiting the proposed disclosure. No such disclosure shall take place until the Court has acted upon such application. In the absence of notice of such application, the party seeking disclosure may proceed, after expiration of said twenty (20) days with the disclosure proposed.

11. The Clerk of this Court is directed to maintain under seal all documents and transcripts of deposition testimony filed in this litigation which have been designated, in whole or in part, as "confidential" pursuant to the terms of this Order.

12. In the event that any information or documents subject to the confidentiality restrictions of this Protective Order is used in pretrial depositions, briefs, or other documents filed with the Court, or is referred to in any hearing before the Court, such use or reference shall be made under seal and bear the legend,

> "THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER: THE CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT."

and/or be reviewed by the Court *in camera* with the public excluded.

13. Within 45 days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of documents, and

all information and notes derived from them, also shall be destroyed. Compliance with this provision shall be certified to by all counsel for the obtaining party or parties.

14. Nothing herein shall be deemed to restrict in any manner the use by any party of its own documents or materials.

15. Nothing herein shall affect the right of any party to seek additional protection against the disclosure of any documents or materials.

16. Any party may apply to this Court at any time, upon proper notice, for a modification of this Protective Order with respect to the handling or designation of any document or for any other purpose.

17. This Order shall be binding upon any future party to this litigation.

/s/ Robert E. Cowen

ROBERT E. COWEN
UNITED STATES MAGISTRATE

**Order Of The District Court**
**dated May 1, 1984**

ROSE D. CIPOLLONE and
ANTONIO CIPOLLONE,

Plaintiffs,

—v.—

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LOEW'S THEATRES, INC.,

Defendants.

---

No 83-2864 SA

United States District Court,
District of New Jersey
Decided May 1, 1984

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**ORDER**

Defendants, Liggett Group Inc., ("Liggett"), Philip Morris, Inc., ("Philip Morris"), and Lorillard Division of Loew's Theatres, Inc., ("Lorillard"), having moved before this Court, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, for a protective order limiting the discovery sought in the First Set of Interrogatories and First Request to Produce Documents served by plaintiffs upon each of said defendants, and this matter having been briefed by all parties and argument having been had before this Court on March 22, 1984; and the Court having determined that the entry of this Order is appropriate for the reasons stated by the Court on the record on March 22, 1984;

IT IS HEREBY ORDERED on this 1 day of May, 1984 that plaintiffs shall have discovery in accordance with the following:

## I. GENERAL RULINGS

1. The definitions and instructions contained in plaintiffs' First Set of Interrogatories and First Request to Produce are hereby stricken. The words used in these discovery demands shall be construed in accordance with their ordinary meanings.

2. Defendants shall not at this time be required to supply any answers to interrogatories or to produce any documents in response to document requests related to or arising out of plaintiffs' claims of conspiracy or concerted action on the part of defendants. This ruling is without prejudice to plaintiffs seeking the same or similar discovery upon a showing to the Court of the factual bases underlying such claims.

3. Each defendant shall be required to answer interrogatories and to produce documents in response to document requests, insofar as such interrogatories or document requests involve lobbying, only for the period commencing on the first of January of the year two years prior to the year in which plaintiff Rose Cipollone began smoking the particular brand of cigarettes produced by such defendant and ending at the time she ceased smoking such brand of cigarettes. All discovery as to lobbying shall be restricted to lobbying efforts involving cigarette smoking and health and to Federal, New York, and New Jersey lobbying efforts.

4. With respect to discovery requests as to the knowledge of writings or other materials claiming a possible relationship between cigarette smoking and health, each defendant shall be required to answer interrogatories and produce documents pursuant to document requests only as to their knowledge in the period commencing on the first of January of the year two years prior to the year in which plaintiff Rose Cipollone began smoking the particular brand of cigarettes produced by such defendant and ending at the time she ceased smoking such brand of cigarettes.

5. With regard to advertising, promotion and marketing, all discovery sought by plaintiffs shall be limited to the New York/New Jersey metropolitan area, to the particular brand(s) of cigarettes smoked by plaintiff Rose Cipollone, as set forth in

the complaint, and for the periods of time commencing on the first of January of the year two years prior to the year in which plaintiff Rose Cipollone began smoking each particular brand of cigarettes, and ending at the time she ceased smoking such brand of cigarettes. With respect to marketing research defendants' response to interrogatories and document requests shall include all prior marketing research used in the aforesaid period(s) for such brand(s).

6. The parties agree that for the purpose of resolving certain disputes as to the interrogatories and document requests heretofore served, all requests explicitly directed to "health", "health consequences" or "injuries" may be responded to as if lung cancer, addiction and emphysema were substituted therefor. Plaintiffs are not hereby precluded from hereafter seeking discovery as to other diseases and defendants are not hereby precluded from opposing such discovery.

7. Defendants rights are preserved as to the assertion of any privileges, including the work product, preparation for litigation and attorney-client privileges, which may protect any information or documents sought by plaintiffs from disclosure. Defendants shall supply to plaintiffs sufficient information so as to enable plaintiffs to make application to this Court for disclosure thereof.

8. Defendants' rights are preserved to make an application to this Court, pursuant to Rule 26(c), for an [sic] protective order governing disclosure of trade secrets or confidential business information.

## II. DISCOVERY DEMANDS WITHDRAWN BY PLAINTIFFS

9. Defendants shall not be required to answer interrogatories 28(f) and (g), 40, 46, 50 (defendants need only respond in the event they state that warnings were placed on packages of cigarettes for a reason other than Federal legislation) and 52, the same having been withdrawn by plaintiffs at or prior to the hearing on March 22, 1984.

10. Defendants shall not be required to produce documents in response to document requests 3, 12 (defendants need only

respond in the event they state that warnings were placed on packages of cigarettes for a reason other than Federal legislation), 15, 17, 18, 21, 22, 28, 30, 31, 33, 34, 38, and 39, the same having been withdrawn by plaintiffs at or prior to the hearing on March 22, 1984.

## III. DISCOVERY DEMANDS AGREED TO BY DEFENDANTS

11. Defendants shall answer interrogatories 1 (including only the names of corporate personnel providing substantive factual information and the general subject matter of the information provided by each), 2 (limited to documents supplying the substantive information provided in answers to interrogatories and excluding work-product), 3 (limited to cigarettes), 10 (limited to the information specified in Rule 26(b) (2) the question being rephrased as follows: "Is there products liability insurance which covers this lawsuit."), 19 (with reference to defendants' "documents retention" program), 20, (it being agreed that this question will be limited to lawsuits involving lung cancer limiting the information in subpart(c) to plaintiffs' attorney and address and in subpart (d) to company witnesses only), 21, (restricted to lung cancer), 28(a)-(e) (subparagraphs (c)-(e) answerable by reference to requirements of federal law), 33, 34, 35, 36, and 39, defendants having agreed to comply therewith at or prior to the hearing on March 22, 1984, subject to paragraph 59 hereof, as it may be applicable.

12. Defendants shall produce documents in response to Document Request 13, (excluding answers to interrogatories as to which protective orders apply), 19, 25, and 26, defendants having agreed to comply therewith at or prior to the hearing on March 22, 1984, all subject to the general rulings set forth in this Order as they may be applicable. Plaintiffs reserve the right to obtain the answers to interrogatories subject to the protective order by signing said order or by such other means as are available. Defendants reserve the right to oppose such application as appropriate.

## IV. RULINGS AS TO SPECIFIC INTERROGATORIES

13. Defendants are hereby required to answer interrogatory 4 restricted to entities involved in the production, manufacturing, or sale of cigarettes for the following periods: Liggett, 1934 to 1968; Philip Morris, 1934 to 1974; Lorillard, 1934 to 1982.

14. Defendants are hereby required to answer interrogatory 5 subject to the geographic, brand and time limitations set forth in paragraph 5 of this Order.

15. Defendants are hereby required to answer interrogatory 6 for the period 1940 to date.

16. Defendants shall not be required to answer interrogatories 7 and 8.

17. Defendants are hereby required to answer interrogatory 9 for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order.

18. Defendants are hereby required to answer interrogatories 11, 12 and 30 for the period 1940 to 1982, interrogatory 12 subject to the terms of paragraph 6 of this Order and interrogatories 11(c) and (f), 12(b), (c) and (d) and 30(b) subject to defendants' right to raise before this Court an objection based upon burdensomeness after detailed investigation of the difficulty in fully responding to these interrogatories.

19. Defendants are hereby required to answer interrogatory 13 subject to the time limitations of paragraph 4 of this Order.

20. Defendants are hereby required to answer interrogatories 14, 15, and 16 subject to the geographic, brand and time limitations of paragraph 5 of this Order.

21. Defendants are hereby required to answer interrogatory 17 subject to the terms of paragraphs 3 and 6 of this Order.

22. Defendants are hereby required to answer interrogatory 18 for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order.

23. Defendants are hereby required to answer interrogatory 22 for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order. Each defendant may, as a complete response to this interrogatory, supply plaintiffs with a copy of the card catalogue or indices of its library, whether such are complete, and the names of the persons in charge of its library.

24. Defendants are hereby required to answer interrogatory 23 for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order.

25. Defendants are hereby required to answer interrogatory 24, for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order, except that this Order does not apply to subpart (d).

26. Defendants are hereby required to answer interrogatory 25, other than subpart (e), for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order and only insofar as it pertains to "sponsored . . . research or investigation."

27. Defendants are hereby required to answer interrogatory 26 for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order.

28. Each defendant is hereby required to answer interrogatory 27, subject to the terms of paragraphs 4 and 6 of this Order.

29. Defendants are hereby required to answer interrogatory 29 subject to the terms of paragraph 3 of this Order.

30. Defendants are hereby required to answer interrogatory 31, said answer to include the names of "anyone who is going to be called as a witness, may be called as a witness, or anyone, who [defendants], if [they] were in plaintiff's shoes, would want to know the name of."

31. Defendants shall not be required to answer interrogatory 37.

32. Defendants are hereby required to answer interrogatory 38.

33. Defendants shall not be required to answer interrogatories 41, 42, 43, and 44.

34. Defendants shall be required to answer interrogatory 45 subject to the terms of paragraphs 4, 6 and 59 of this Order, provided that, if any defendant intends to utilize at trial information beyond the period set forth in paragraph 4, that defendant shall supply such information to plaintiffs.

35. Defendants are hereby required to answer interrogatory 47, subject to the terms of paragraph 3 of this Order.

36. Defendants are hereby required to answer interrogatories 48 and 49, subject to the terms of paragraph 59 of this Order.

37. Defendants are hereby required to answer interrogatory 51, subject to the geographic, brand, and time limitations set forth in numbered paragraph 5 of this Order.

## V. RULINGS AS TO SPECIFIC DOCUMENT REQUESTS

38. Defendants are hereby required to produce documents in response to document request 1 for the periods specified with regard to interrogatory 4.

39. Defendants are hereby required to produce documents in response to document request 2 for the period 1940 to 1982, limited to published articles of persons identified by defendants in response to interrogatory 17.

40. Defendants are hereby required to produce documents in response to document request 4 subject to the terms of paragraphs 4 and 6 of this Order.

41. Defendants are hereby required to produce documents in response to document requests 5 and 6 for the period 1940-1982, subject to the terms of paragraph 6 of this Order. With respect to document request 6 production of an index or list of periodicals shall be sufficient.

42. Defendants are hereby required to produce documents in response to document request 7, limited to documents in the files of persons who acted as designated representatives to trade associations for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order.

43. Defendants are hereby required to produce documents in response to document request 8 for the period 1940 to 1982, limited to articles contributed by persons identified by defendants in response to interrogatory 17 and subject to the terms of paragraph 6 of this Order.

44. Defendant [sic] are hereby required to produce documents in response to document request 9 for the period 1940 to 1982, subject to the terms of paragraph 6 of this Order.

45. Defendants are hereby required to produce documents in response to document request 10 for the period 1940 to 1982, restricted to research or investigation "sponsored" by defendants and subject to the terms of paragraph 6 of this Order.

46. Defendants are hereby required to produce documents in response to document request 11 to be found in the files of defendants' designated representatives, subject to the terms of paragraphs 4 and 6 of this Order.

47. Defendants shall not be required to produce any documents in response to document request 14.

48. Defendants are hereby required to produce documents in response to document request 16 for the period 1940 to 1982, restricted to documents to be found in the files of the persons identified by defendants in response to interrogatory 9.

49. Defendants are hereby required to produce documents in response to document request 20 for the period 1940 to 1982, subject to the redaction of confidential business materials from the minutes of trade associations for *in camera* review of the redacted materials by this Court, and further subject to the terms of paragraph 6 of this Order.

50. Defendants are hereby required to produce documents in response to document request 23, subject to the geographic, brand and time limitations set forth in paragraph 5 and the terms of paragraph 6 of this Order.

51. Defendants are hereby required to produce documents in response to document request 24 for the period 1940 to 1982, subject to the redaction of confidential business materials from the minutes of the boards of directors and *in camera* review of the redacted materials by this Court, and further subject to the terms of paragraph 6 of this Order.

52. Defendants are hereby required to produce documents in response to document request 27, subject to the time and brand limitations of paragraph 5 of this Order.

53. Defendants shall not be required to produce any documents in response to document request 29.

54. Defendants are hereby required to produce documents in response to document request 32 for the period 1964 to 1982 limited to the proceedings and hearings before boards, bodies and agencies of the United States and for the States of New York and New Jersey.

55. Defendants are hereby required to produce documents in response to document request 35 for the period commencing the date of the enactment of the Federal Cigarette Labeling and Advertising Act in 1965 and ending when plaintiff Rose Cipollone ceased smoking the particular brand of cigarettes produced by each defendant.

56. Defendants are hereby required to produce documents in response to document request 36 and 37, subject to the geographic, brand, and time limitations set forth in paragraph 5 of this Order.

## VI. TIMING OF DISCOVERY

57. Defendants shall respond to plaintiffs' First Set of Interrogatories, in accordance with the rulings contained in this Order, on May 1, 1984, except for responses related to emphysema which shall be given on June 1, 1984.

58. Defendants shall commence production of documents for plaintiffs' examination and inspection in response to plaintiffs' First Request to Produce, in accordance with the rulings contained in this Order, on May 1, 1984, and such production shall continue thereafter on an ongoing basis as responsive documents are located. All documents shall be produced on or before September 1, 1984, unless said period is enlarged by the Court upon motion brought on by defendants, or any of them, prior to September 1, 1984.

59. All discovery requests as to "expert witnesses" and written reports authored by them (including such requests contained in interrogatories 32, 33, 34, 35, 36, 45, 48, and 49) shall be responded to in the time and manner to be further directed by this Court.

s/Robert E. Cowen

ROBERT E. COWEN,
United States Magistrate

Thursday, September 26, 1985

Coram: HIGGINBOTHAM, BECKER and STAPLETON,
Circuit Judges

2:30 P.M.
COURTROOM #1
Nos. 85-3423/85-3424/95-5529 & 85-5530

ANTONIO CIPOLLONE, etc.,
*Plaintiff-Respondent,*

vs.

LIGGETT GROUP INC., etc., et al.,
*Defendants-Petitioners.*

LIGGETT GROUP INC., etc., et al.,
*Petitioners,* No. 85-3423,

vs.

HONORABLE H. LEE SAROKIN, etc.,
*Nominal Respondent.*

---

SUSAN HAINES, etc.,
*Plaintiff-Respondent,*

vs.

LIGGETT GROUP INC., etc., et al.

LIGGETT GROUP INC., etc., et al.,
*Petitioners,* No. 85-3424,

vs.

HONORABLE H. LEE SAROKIN, etc.,
*Nominal Respondent.*

---

ANTONIO CIPOLLONE, etc.,

vs.

LIGGETT GROUP INC., etc., et al.,

LIGGETT GROUP INC., PHILIP MORRIS INCORPORATED and LOEW'S THEATRES, INC.,
*Appellants,* No. 85-5529.

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WALTER N. KLAUDER
Certified Shorthand Reporter
104 Pixie Moss Trail
Medford, New Jersey 08055
(609) 654-5841

SUSAN HAINES, etc.,

vs.

LIGGETT GROUP INC., etc., et al.,

LIGGETT GROUP INC., LOEW'S THEATRES, INC., R.J. REYNOLDS TOBACCO CO., PHILIP MORRIS INCORPORATED and THE TOBACCO INSTITUTE,

*Appellants*, No. 85-5530.

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REPORTED BY:

WALTER N. KLAUDER, Certified Shorthand Reporter and Notary Public of New Jersey, from cassette tapes on Monday, September 30, 1985, at Court of Appeals, 601 Market Street, Philadelphia, Pennsylvania.

APPEARANCES:

PORZIO, BROMBERG & NEWMAN, ESQUIRES,
by MARC Z. EDELL, ESQUIRE,
*Counsel for Appellee/Respondent*
*(Antonio Cipollone, etc. and Susan Haines, etc.)*

WEBSTER & SHEFFIELD, ESQUIRES,
by DONALD C. COHN, ESQUIRE,
*Counsel for Appellants/Petitioners*
*(Liggett Group, Inc.)*

ARNOLD & PORTER, ESQUIRES,
by MURRAY H. BRING, ESQUIRE,
*Counsel for Appellants/Petitioners*
*(Philip Morris Incorporated, The Tobacco Institute, Loew's Theatres)*

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JUDGE HIGGINBOTHAM: Counsel, on the allocation of time.

MR. COHN: Yes, your Honor, my name is Donald Cohn for the Appellant. I will take the first five minutes and Mr. Bring will have the balance of the twenty.

JUDGE HIGGINBOTHAM: You may proceed. I gather there's no reservation for rebuttal?

MR. COHN: Mr. Bring may reserve some of his fifteen minutes for rebuttal. May it please the court, my name is Donald Cohn, a member of the firm of Webster and Sheffield. We represent the Liggett Group. Mr. Bring and I will present the argument for all the appellants. This case involves issues which have recently been before the Supreme Court and this Court in Seattle Times and New York State v. U.S. Metals. It would seem clear that under those cases a Protective Order under rule 26-C, which is issued for good cause, does not run afoul of the First Amendment.

JUDGE BECKER: What's the good cause in this case?

MR. COHN: The good cause, your Honor, is that the plaintiffs made their intent clear

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to take the private documents of these defendants, which have been produced solely because of the compulsion of the federal rules, make them public together with their explanations thereof for the purpose of casting defendants in the worst possible light.

JUDGE BECKER: Well, Mr. Cohn -- it's Mr. Cohn, right?

MR. COHN: Yes, your honor.

JUDGE BECKER: Is it your contention that the lawsuit was brought solely for that purpose? That it was a frivolous, baseless lawsuit?

MR. COHN: No, your Honor.

JUDGE BECKER: What is the allegation, what are the allegations of the underlying lawsuit? That's not discussed much in your papers, and the Complaint is not even in your appendix.

MR. COHN: Well, the allegations are basically products liability under strict liability in court [sic], there are allegations of negligence, and there ar allegations of fraud, and they also allege risk utility.

JUDGE BECKER: Well, you don't contend, do you, that information that is

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non-confidential, information that even under the broadest reading of rule 26 would come thereunder, may not be disclosed, would you?

MR. COHN: Yes, your Honor. Our, my position --

JUDGE BECKER: Information for which there is not good cause under rule 26 to protect?

MR. COHN: Oh, no, your Honor. But we, our position is --

JUDGE BECKER: Well, how do we know how much of that there is?

MR. COHN: Well, your Honor, the magistrate had granted in this case very broad discovery. He had granted it on the representation from plaintiff's counsel that it was going to be used for the purpose of this case. After discovery was granted, plaintiff's counsel made clear his intent to issue, to publicize the discovery, and I don't think there's any dispute about that, not even in front of Judge Sarokin. In fact, Judge Sarokin so found. It was then that we went to the magistrate and said this is an abuse of the federal rules, that this is not what the federal rules compelled us to produce this information

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for. We were compelled to produce this for the purposes of this case. And the magistrate --

JUDGE BECKER: Are you saying you waived your objection to discoverability of certain materials simply because you thought it was not going to be used beyond the confines of this case?

MR. COHN: Your Honor, we were compelled to produce these materials, and we were compelled to do so under the federal rules.

JUDGE BECKER: In all events, Mr. Cohn, you concede that if there is information which has been produced in discovery, which there is not good cause to protect under rule 26, that there is no inhibition upon the disclosure of that to anybody?

MR. COHN: Well, your Honor, if there is -- it depends on what you say is good cause.

JUDGE BECKER: I'm saying assuming arguendo that there is not good cause.

MR. COHN: Then the magistrate has the discretion to allow it to be disseminated. I think it's within the discretion of the magistrate.

JUDGE BECKER: Well, passing that by,

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what is the nature of this material that gives you good cause to protect it?

MR. COHN: The nature of the material, your Honor, is that the plaintiff has made it clear that they're going to disseminate it, and disseminate it for the purpose of casting the defendants in the worst possible light. Now, there is no way we can predict --

JUDGE HIGGINBOTHAM: Where is the record finding of the plaintiff's intent?

MR. COHN: Your Honor, Judge Sarokin, in his opinion --

JUDGE HIGGINBOTHAM: Can you give me the page, please? That would be most helpful.

MR. COHN: Oh!

JUDGE HIGGINBOTHAM: We've read through his opinion.

MR. COHN: Getting back before Judge Sarokin, magistrate Cowen had before him the statement of plaintiff's counsel that they were seeking this broad discovery for the purpose of the case, he had before him the statement that they were now seeking to disseminate it, and Magistrate Cowen also had before him the plaintiff's explanation why they were going to

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do this. This is before Judge Sarokin, too.

JUDGE HIGGINBOTHAM: Can you please give me a record of reference on terms of the intent of counsel as found by either the judge or any place else in the opinion?

MR. COHN: A-10, Judge Sarokin's opinion, bottom of the second full paragraph: "These matters may be private, and their disclosure may prove embarrassing. . ."

JUDGE HIGGINBOTHAM: A-10?

MR. COHN: Yes, your Honor, of the appendix. It's the bottom of the second full paragraph. This is in Judge Sarokin's opinion where he states: "These matters may be private, and their disclosure may prove embarrassing and incriminating, but that alone would not be sufficient to bar them from the public and the press."

Now, it is our position that this is good and sufficient reason for entering a Protective Order under rule 26-C which provides that it should be, defendants should not be embarrassed, annoyed and oppressed.

JUDGE BECKER: What is your authority, what is your best case, Mr. Cohn, that mere or

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shear embarrassment, qua embarrassment, is enough to protect documents under rule 26?

MR. COHN: I'd say Seattle Times and New York State v. U.S. Metals.

JUDGE HIGGINBOTHAM: In Seattle Times they stressed, as I recall, very much that there was oppression, there was testimony that some of the litigants had been threatened with abuse, that they were fearful of physical abuse. So at least we don't have, on all fours, the element of anyone making a finding, as had been made by all of the courts, I believe in Oregon, in Washington, of oppression. There's no finding of oppression in this case, is there?

MR. COHN: Well, there's no finding of oppression. Magistrate --

JUDGE HIGGINBOTHAM: And there was a finding of oppression in Seattle --

MR. COHN: No. But, your Honor --

JUDGE HIGGINBOTHAM: Am I correct on that?

MR. COHN: Yes, your Honor. But magistrate Cowen didn't make findings as such. He had before him the whole record. He was familiar with the whole background of discovery.

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JUDGE HIGGINBOTHAM: We have to make a review of our findings, Counsel.

MR. COHN: I understand that. And in New York State v. U.S. Metals where --

JUDGE BECKER: You have two-thirds of the panel of New York State versus American Metals up here.

MR. COHN: I understand that.

JUDGE BECKER: Now, even Higginbotham and I can't reform the opinion. But at least -- and Stapleton can scream if we try. But in that case you had concern about unwarranted panic among the residents of Staten Island about P.C.B.'s or whatever it is that they were supposedly spewing from this filter across the Arthur Kill, against the claim that it was a one-sided misleading report. Isn't that very different than the sensibilities of the executives of the tobacco industry whose motives have been subjected to public view since the first surgeon general's investigation and report?

MR. COHN: Your Honor, it's not the sensibilities of the tobacco executives we're talking about here.

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JUDGE BECKER: And the business of the company.

MR. COHN: And their public reputation. And the magistrate --

JUDGE BECKER: Well, give us a better case than either -- give us a better case on embarrassment on the theory -- I take it that you don't contend that Seattle Times obliterated the good cause shown required?

MR. COHN: Absolutely not, your Honor.

JUDGE BECKER: All right. Well, then, give us your best case leaving aside now Seattle Times and Amax, that aside from sensitive commercial information, a lot of cases on sensitive commercial information, so forth, trade secrets, but that embarrassment, or trade, or deformation of a corporate reputation is sufficient good cause to protect something under rule 26-C.

MR. COHN: Well, we would also add to that our ability to get a fair trial, which is made clear in our papers. In other words, creating a public atmosphere.

JUDGE BECKER: Well, let me say this, Mr. Cohn, if that's your best argument --

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MR. COHN: No.

JUDGE BECKER: -- I speak only for myself, there are zillions of cases in this circuit, criminal cases, where there's been widespread publicity, where the court has held that careful voir dire procedures are sufficient to protect the right to a fair trial. Now, I'm not trying to take that argument away from you, something we ought to consider, but what I would be interested in is what other cases you rely upon.

MR. COHN: Well, the one in front of Judge Mazzoni in Boston, Massachusetts --

JUDGE BECKER: Same case.

MR. COHN: Same case, same type of case. Each of these cases is different, however, it's the same type of case, and Judge Mazzoni also found good cause as magistrate Cowen did, and magistrate Barnes, magistrate Devine in the Barnes' case, also in a very similar order found that there was good cause. In terms of the closest cases, I would say those are.

JUDGE STAPLETON: How do we know what kind of case this is? Am I wrong in thinking that no one, neither the magistrate nor Judge

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Sheridan has looked at a document and said this document is protectable under 26-C, or this document is not protectable under 26-C? How can we know what documents we're talking about? Nobody's passed on it, right?

MR. COHN: Well, magistrate Cowen ruled that all discovered material, and he certainly didn't include anything that was in the public domain, is to be used for the purposes of this case. Before him the plaintiff submitted a whole slew of documents --

JUDGE STAPLETON: You're talking about paragraph 2 --

MR. COHN: Yes, your Honor.

JUDGE STAPLETON: -- of the magistrate's Order?

MR. COHN: That's right.

JUDGE STAPLETON: It didn't include every document received in discovery?

MR. COHN: Yes, it was -- but it did not cover material that was not compulsively produced under discovery. In other words, Seattle Times makes it clear that you cannot limit anybody's right to disseminate material which is in the public domain.

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JUDGE STAPLETON: We can agree that paragraph 2 of the Magistrate's Order restricted the use of documents which are not protectable under rule 26-C, can we not?

MR. COHN: No, your Honor, I would not agree to that. I think they are protected under 26-C.

JUDGE STAPLETON: I thought you just told me that paragraph 2 applied to every document that was acquired in discovery?

MR. COHN: That's correct, which is not in the public domain. In other words, a public document cannot be protected, but a document from our private files which we have been compelled to produce can be protected under paragraph 2 of the Magistrate's Order.

JUDGE STAPLETON: Just so I make sure I understand the status of this case, and I think we are in agreement that nobody has yet looked at a document --

MR. COHN: No, your Honor --

JUDGE STAPLETON: All right.

MR. COHN: The magistrate did look at some documents, that's what I was trying to say. I'm sorry if I did not make that clear.

[15]

JUDGE STAPLETON: Can we agree that Judge Sarokin's Order only does two things of any consequence: One, it puts the burden on the defense to initiate 26-C proceedings, whereas the magistrate had it on, had the burden on the other side; and, two, he decided that if it turns out that there are documents protectable under 26-C, that plaintiff can use them in other cases where plaintiff's counsel is counsel of record? Isn't that really all that Judge Sarokin's Order did? And it left you to assert your rule 26-C rights whenever you want to assert them?

MR. COHN: No, your Honor. What Judge Sarokin's Order did was to permit the plaintiffs immediately to disseminate any document that was not going, that the defendants had not marked as confidential, so those documents could be immediately disseminated without further proceedings whatsoever.

JUDGE STAPLETON: The ones you had not marked confidential?

MR. COHN: That's correct, your Honor. There have been thousands and thousands of documents produced here, the effect of Judge

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Sarokin's Order was to immediately allow the dissemination together with comment and vilification without any further proceedings, and then it was up to the defendant --

JUDGE BECKER: The documents marked not confidential?

MR. COHN: That's correct, your Honor.

JUDGE BECKER: Were they confidential?

MR. COHN: Under Magistrate Cowen's Order confidential documents are handled in a different way, they cannot be shown to as many people as documents not marked confidential, people who see them have to sign protective orders and subject themselves personally to the jurisdiction of the court.

JUDGE BECKER: What's confidential under Cowen's Order of the documents not marked confidential?

MR. COHN: Those are private documents, your Honor, which nobody would have access to absent the compulsion of the federal rules, and --

JUDGE BECKER: What you're saying, you basically relied on Magistrate Cowen's Order that restricted use to this litigation and the designated people, so you didn't bother to

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designate them confidential, and had it not been for that Order, you would have?

MR. COHN: I wouldn't go that far, your Honor.

JUDGE BECKER: Well, then, what is your position?

MR. COHN: The point is that there are many documents here which, although are not trade secrets, are the kinds of documents that a defendant has an interest in keeping private.

JUDGE BECKER: Why didn't you mark them confidential?

MR. COHN: Because there was no need to have them under the more elaborate confidence. In other words, we did not want to, not we didn't want to, the plaintiff's lawyers are officers of the court, and with respect to those documents not marked confidential, it was not felt any need to restrict his use of those documents for the purpose of the case.

JUDGE BECKER: You were sandbagged; is that right and Sarokin breached the dike, basically. You were lulled into a false sense of security by Cowen's Order, and you didn't mark things confidential that you otherwise

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would have?

MR. COHN: No, your Honor, because the plaintiff never agreed to that. I mean they made it clear that they would not agree to that.

JUDGE BECKER: Well, then, didn't you waive your rights, at least with respect to those documents, by not marking them confidential?

MR. COHN: No, your Honor, because we think under rule 26-C as interpreted by Seattle Times and by this court that a Federal Court has the discretion which magistrate Cowen exercised to prevent an abuse of the federal rules for purposes for which they were not designed.

JUDGE HIGGINBOTHAM: Let me see if I can articulate what I think you're arguing while you're using your colleague's time. It's your position that they would not have had access to these non-confidential documents but for the use of the discovery procedure, and having once utilized the discovery procedure to get non-confidential documents, you are entitled to a protective order under rule 26?

MR. COHN: Non-confidential private

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documents, your Honor, under the circumstances in this case, yes.

JUDGE HIGGINBOTHAM: That's your position?

MR. COHN: That's right, your Honor, these are private documents.

JUDGE HIGGINBOTHAM: Now, you rely upon Seattle Times. As a theoretician of the constitutional law, you must concede that we would be expanding the scope of Seattle Times on the facts, because Seattle Times had a judicial finding that the release would lead to oppression, and you have not cited anything to me where any finding has been made of oppression in this case.

MR. COHN: Well, your Honor, I think rule 26-C is in the alternative --

JUDGE HIGGINBOTHAM: Counselor, please try to answer my question, and I'm trying to give it to you very clearly. I'm talking about Seattle Times. Seattle Times had a finding of oppression. In this case I submit to you there has not been any finding of oppression.

MR. COHN: But, your Honor --

JUDGE HIGGINBOTHAM: Am I wrong, or am I right on that?

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MR. COHN: I think that Judge Cowen's Order can encompass a finding of oppression.

JUDGE HIGGINBOTHAM: All right, give me the citation as to where he found oppression.

MR. COHN: He did not, your Honor. All he said was for good cause shown. And based on this record --

JUDGE HIGGINBOTHAM: We either have a finding, Counsel, or we don't. And it seems to me that you have to level with us. If you got a finding of oppression, I want it, and I want to give you the benefit of it. If you don't have a finding of oppression, then I want to know whether I should interpret Seattle Times with a gloss that does not require oppression. That's all I'm trying to ascertain.

MR. COHN: Okay, your Honor. But the magistrate, neither did he find annoyance or embarrassment. In other words, the magistrate did not make specific findings, that's my point. I thought I had earlier on said there was no specific finding of oppression, but perhaps -- I don't want to use up all Mr. Bring's time.

JUDGE HIGGINBOTHAM: He's generous.

MR. COHN: Okay. The point is, your

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Honor, in view of the magistrate's background in this case, in view of his running discovery throughout the whole period --

JUDGE STAPLETON: How long was the period, by the way?

MR. COHN: Oh, right now, your Honor, it's been over a year, approaching a year and a half. And there have been a lot of proceedings in front of Magistrate Cowen. He was fully familiar with them. What I'm suggesting is, given the whole context of what was before him, he was justified and one can get from the record a finding of annoyance, embarrassment and oppression. And Judge Sarokin really had no disagreement with that, he also saw the embarrassment and annoyance and oppression, but we submit under his misreading of Seattle Times, he ignored it, he said it was not good enough, it was not a good enough cause. What I suggest here, your Honors, he entered into a de

nova review of Magistrate Cowen's Order, which we believe was beyond his legal authority, because, because the standard is clear error or clear to law. He then took a look at Judge Cowen's good cause finding under a de nova review and

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said it wasn't good enough on the basis of the same misreading of the First Amendment in Seattle Times which led him to do the de nova review in the first place. Thank you, your Honor.

JUDGE HIGGINBOTHAM: Thank you. How much does this colleague have left in time? Five minutes. Does that seem unfair to you?

MR. BRING: Well, your Honor --

JUDGE HIGGINBOTHAM: If it seems unfair to you, I will give you more time.

MR. BRING: I'm going to level with you, it does, your Honor.

JUDGE HIGGINBOTHAM: Could you handle it in ten minutes?

MR. BRING: Yes. I'd like to reserve three minutes for rebuttal.

JUDGE BECKER: If we don't ask you any questions.

MR. BRING: I hope you will, and I am quite confident that you will based on what I've heard so far.

JUDGE HIGGINBOTHAM: We'll give you additional time. Suppose we give you a total of fifteen to --

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MR. BRING: That would be very fair.

JUDGE HIGGINBOTHAM: -- to reallocate in whatever way you think is appropriate.

MR. BRING: Thank you very much, your Honor. I'd like to reserve four minutes for rebuttal.

JUDGE HIGGINBOTHAM: Fine.

MR. BRING: Your Honors, may it please the Court, my name is Murray Bring of the firm of Arnold and Porter in Washington, and as Mr. Cohn indicated, the two of us are presenting arguments today on behalf of all five appellants.

I would like to pick up on the questions that you were asking Mr. Cohn before he sat down with respect to the issue of good cause, because it's obviously a question that's important, and one that has the Court concerned.

With respect to, Judge Higginbotham, to your question as to where there is a finding in the record as to good cause, there were no specific findings as such by Judge Cowen, but in his Protective Order, which is found in the appendix at page A-58, Judge Cowen did say that: "The confidential business records and private information of the parties should be given the

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protection of an Order of this Court to prevent injury and invasion of the confidential property of the parties."

Now, that is not language that he simply picked out of the air, I suggest to the Court. The reason that he was concerned about preventing injury was because, as Mr. Cohn had indicated, the record at this point clearly indicated that Mr. Edell and his colleagues intended to release a number of private and confidential documents to the press for the purpose of embarrassing this industry, and for the purpose of conducting a public relations --

JUDGE HIGGINBOTHAM: And you say that Judge Cowen's finding would be a synonym for the nomenclature that was used in Seattle?

MR. BRING: Exactly, your Honor, that's exactly correct.

JUDGE BECKER: Let's move along from that substantive argument to the matter of procedure?

MR. BRING: Yes, sir.

JUDGE BECKER: Judge Sarokin did not, by his amended Order, purport to deprive you of all confidentiality protection, he, in your view, as I clearly understand it, unduly

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narrowed the notion confidentiality, and erroneously narrowed the notion of confidentiality, but it seems to me, and Judge Stapleton remarked about this earlier, that one of the significant things that Judge Sarokin did was to shift the burden. Now, leaving aside the references to the Zenith cases, which you have liberally sprinkled your briefs with, not knowing that you would have the two Zeniths, the only two surviving, the only two judges that spent any time with the Zenith case and survived on the bench, nevertheless, it seems to me that you had an obligation, once you had Judge Sarokin's order to comply, and even though you contend that he erroneously shifted the burden to you, why didn't you go to Magistrate Cowen and say, well, okay, here are our five thousand, or ten thousand, or fifteen thousand, or whatever, confidential documents? Have you made a profert that there is -- seeking a finding from a judicial officer in this case, that there is a single document worthy of protection?

MR. BRING: Your Honor, the answer to that question is no. And let me explain why.

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I think it's important to look at the context in which these issues have arisen. We are not here talking about whether or not a particular document should be protected, as was the case, for example, in the New York – U.S. Metals' case, we are at the outset of the litigation, the magistrate in the effort to establish a management structure for handling this very complex case,

which involves literally hundreds of thousands of documents, was confronted with the issue at the outset of what kind of discovery should he decree and what kind of --

JUDGE BECKER: Let's assume that at the outset Judge Cowen, Magistrate Cowen had entered Judge Sarokin's Protective Order, which put the burden on you, would you have had an -- and what you had on tabula rosa had order number one that says, okay, Mr. Bring, you and your people, if you want anything declared confidential, you have to go to the judge, rather than just have the paralegal red stamp over everything, then they have to object, if the Order had said you've got to go to the judge for a declaration of confidentiality, would you have had an appealable

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order at that juncture?

MR. BRING: I think we would, your Honor --

JUDGE BECKER: On what basis and on what authority if this had been at the outset of the litigation would you have had an appealable order?

MR. BRING: I think we would have had, we would have had an appeal on the ground that that constituted an abuse of discretion. And I certainly would have cited very heavily both Judge Higginbotham's opinion and Judge Becker's opinion in the Zenith case, both opinions indicate that this is not the common sense way to handle document production from a very large case. And I would also cite --

JUDGE BECKER: Is there any authority -- now, let me say it is obvious, and I trust that plaintiff's counsel are aware of not only the case law authority, but I think the very substantial authority in the Federal Judicial System of The Manual for Complex Litigation, and in particularly Manual for Complex Litigation 2nd, which has been made available to the bench and bar, and will shortly go to

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press, which makes it clear that the appropriate way to deal with these things is to have an umbrella protective order, have them marked confidential, then the objecting party can object, subject, I should hope that counsel understands, to sanctions under rule 26 for people who mark these things confidential that don't turn out to be confidential. But, assuming, Mr. Bring, that there is this, I think, fairly impressive authority, Judge Higginbotham's opinion, and the Manual for Complex Litigation, does that -- do these teachings as to case management, as to a desirable way of managing a case, arise to an abuse of discretion? Is that authority sufficient that we should inculcate into the juris prudence, taking away the flexibility of a trial judge who says in a given case because of the significant First Amendment interest involved or the significant interest in public health, or the significant interest of people who are still smoking to this day, and who may contract lung cancer, can we, merely because of the salutary precepts of case administration embody them in to the law and say it is an abusive discretion

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for a judge to reverse the ordinary burden?

MR. BRING: Well, your Honor, my answer to that question would be yes, I think you can. Because I think the question of what is a proper exercise of discretion is intimately related to what is the right way in which to manage complex cases, I think in terms of the supervisory function that this Court as a Circuit Court performs for the District Courts in this circuit, I think you can clearly indicate that you think that is the preferrable way to proceed, and that there is an abuse of discretion involved in not proceeding on that basis. I should point out, also, your Honor, that is in fact what has been going on in this very case before any question of the entry of a Protective Order was raised before Judge Cowen. For months, literally, documents had been produced by the defendants to the plaintiffs in an effort to expedite discovery with an informal understanding that all documents that were not already in the public domain would

be considered confidential and would be subject to the protection of a Protective Order if and when we got around to agreeing to one. As your Honor

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knows, in ninety-five percent of the cases or more, these matters are handled by consent, the parties enter into an agreement at the outset of the litigation, which they then present to the District Court for entry so there will not be continuous haggling over discovery matters. As your Honor also knows, literally thousands and thousands of documents are produced which are irrelevant in the long run and very, very, very little bearing on the issues of the case. And if the party producing them had to go to the court each time it marked one of those documents confidential before the other side had even seen it, before the other side had even decided there was any interest in that document, and make a motion, as Judge Sarokin has required us to do, to get a ruling from the magistrate or from Judge Sarokin that the document is entitled to protection, the magistrates in the District Courts would be spending all of their time ruling on thousands of motions asking for protection of documents that nobody has any interest in. Now, that is such a ludicrous position, I suggest to the court, I think it does rise to an abuse of discretion to impose

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that kind of a burden on the parties and on the court.

JUDGE BECKER: Why should, why should not documents that have been produced in the litigation be available for use in other litigation, Mr. Bring? It's a very common practice in the federal system, very common for lawyers to subpoena all documents produced in another litigation.

MR. BRING: You're right, your Honor, and I've seen many Orders to that effect, I'm sure your Honor has, also. There is no question that there are situations in which that kind of a provision in an Order is common and in which it would not be an abuse of discretion to enter it.

JUDGE BECKER: Why is there an abuse of discretion here?

MR. BRING: Well, I don't think there is an abuse of discretion here. Judge Cowen exercised his discretion by indicating that that should not be the case in this situation. If he had gone the other way --

JUDGE BECKER: Why shouldn't it be?

MR. BRING: Excuse me?

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JUDGE BECKER: Why shouldn't it be the case in this situation?

MR. BRING: Why should it not be an abuse of discretion?

JUDGE BECKER: What's special about this case that these documents shouldn't be available in Boston or Kansas City subject to appropriate protection? I mean the usual order is that -- indeed, the usual order, let's say in the Boston case was that you can get all documents in this case subject to this court's confidentiality order.

MR. BRING: Right. Your Honor, I would say that the kind of order you and I are talking about now typically comes up in a situation where you have a mass tort, or where you have a common disaster where the underlying facts are the same and where the documents that are produced in one case understandably should be made available in all cases. That is not true here, each of these cases is separate, you have different parties, you have different diseases, you have different products, you have different smoking histories, each of these cases is sui generous.

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Now, I'm not suggesting that the documents that have been produced in this case should never be available, made available to plaintiffs in other cases. All we have indicated is that we, to

the extent they are going to be made available, that should be done pursuant to the discovery in those cases. Let the magistrate or the judge in those other cases make an informed judgment as to what the proper scope of discovery is going to be in this case. That has not happened in any of these cases. It would take virtually no effort at all on Mr. Edell's part or anyone else's part to submit a very simple fifteen word statement saying produce all the documents that you've already produced in Cipollone. At that point the judge or magistrate in that case could determine whether he wants all of those documents brought into his case, many of which may be totally irrelevant to the issues in this case. We think it's just a question of proper judicial administration.

The problem here is that under the Order that Judge Sarokin's entered, Mr. Edell is now free to disseminate these documents anywhere he

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wants. And even if we were talking about Judge Cowen's Order, which prohibited him from giving documents to attorneys in other cases, under Judge Sarokin's approach, once Mr. Edell is free to make those documents available to a lawyer in another state, there is no jurisdiction left in Judge Cowen or in Judge Sarokin to prevent the lawyer in the other state from disseminating them to the press. So that Judge Sarokin's Order loses its effectiveness once the documents go beyond the jurisdiction over which he has power.

JUDGE HIGGINBOTHAM: Mr. Bring, can you help me on the Seattle case?

MR. BRING: Yes, sir, I'll try.

JUDGE HIGGINBOTHAM: In the Seattle case there was a clear expression of the intent by the newspapers to publicize the material which they had gotten through the discovery. If Judge Sarokin had limited his Order to merely letting counsel, this counsel, use that litigation in other cases in which he was associated, why would Seattle Times be applicable?

MR. BRING: Your Honor, I think the problem that we have here is that Judge Sarokin's

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opinion, I think, has to be read as a totality. And it is clear that he has completely, in my judgment at least, misread Seattle Times.

JUDGE HIGGINBOTHAM: Yes, but we don't have to issue an opinion which is an all or nothing.

MR. BRING: That's correct, your Honor.

JUDGE HIGGINBOTHAM: We have the theoretical option to affirm in part, to reverse in part.

MR. BRING: That's correct.

JUDGE HIGGINBOTHAM: And what I'm trying to ascertain in terms if his Order was too broad, is it still possible in reading Seattle that Seattle would not infringe on the suggestion I've made to you?

MR. BRING: I think it's possible, your Honor, although I think it's important to recognize also that Seattle Times involved an Order which is very similar to the Order that Judge Cowen entered here in the sense that it said that documents produced in this case shall be used for purposes of this case only. That is the Seattle Times Order. Now, it's true it was related to a specific group of documents,

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it was not an umbrella Order that related to every document that had been produced in the case.

JUDGE HIGGINBOTHAM: And it was related, however, to an intent by the newspapers to publish it.

MR. BRING: That is correct. And let me, in that connection, your Honor, if I may, because it's a question that I think was left unanswered, you asked for a record citation in which there is indication that Mr. Edell had expressed any intention to release these documents to the press --

JUDGE HIGGINBOTHAM: I read in your brief the references in the National Law Journal.

MR. BRING: Yes. Well, there is also at page A-227 of the record a letter which Mr. Edell wrote to counsel for the Tobacco Institute in which he says, I quote: "I hereby give notice of my intent to disclose documents marked as exhibits 1 through 30 at the deposition of Horace Conergate to the general public." Now, that letter was before Judge Cowen when he decided to enter this umbrella

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protective order, and I suggest to the court that letter had a great deal to do with Judge Cowen's decision that in order to prevent a side show from developing public relations, he was going to enter a protective order of the type that was entered in Seattle Times of limiting, of limiting all of the documents produced in this case to use in this case.

Now, getting back to your specific question, Judge Higginbotham, as to whether or not it would be offensive to Seattle Times if the Order in this case were revised in some way so as to permit Mr. Edell to use some of these documents in other cases in which he is counsel of record, I would have to say that I don't think that in itself would violate Seattle Times. I think it would have to be clearly understood, however, that, that there had to be some mechanism to prevent lawyers in other cases outside of the jurisdiction of Judge Sarokin or Judge Cowen, or even the third circuit, from obtaining these documents from Mr. Edell and then themselves disclosing them to the press. And that I think is one of the problems that Judge Cowen was trying to protect against by

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saying it had to be limited for use in this case only.

JUDGE HIGGINBOTHAM: If I may press you?

MR. BRING: Yes.

JUDGE HIGGINBOTHAM: If we concluded to some extent Judge Sarokin had overread the First Amendment rights, wouldn't it be appropriate for us to give instructions in terms of our view on the First Amendment aspect and to send it back for him to make whatever findings would be necessary under rule 26 rather than to do what some appellant judges find easy to do, with our ignorance, write the Order making the delineations?

MR. BRING: First of all, your Honor, I would not say a panel which included the two judges that supervised the Zenith case a panel that contains any ignorance whatsoever.

JUDGE HIGGINBOTHAM: It was Judge Stapleton's --

JUDGE BECKER: Judge Stapleton's from Delaware, Judge Stapleton is a district judge for about thirteen years, he handled more big cases than anybody.

MR. BRING: I didn't mean to exclude

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Judge Stapleton, but I was only referring to the one case that has so much direct relevance to the one that we have before us here.

Your Honor, I am not going to say that that is not an option that's open to you, obviously it is an option, and obviously we have seen cases --

JUDGE HIGGINBOTHAM: But is it unreasonable, if we don't reverse completely?

MR. BRING: I couldn't say it's unreasonable, I think it's unnecessary. The reason I think it's unnecessary is because it is quite clear in my judgment that on the record we have before us here, Judge Cowen was perfectly correct in entering an umbrella protective order at the outset of this litigation, he acted entirely within the scope of his discretion, particularly in view of the representations that had been made to him by Mr. Edell of his intention to release documents to the press.

Now, the Supreme Court in Seattle Times could have taken the same approach, I suppose, it could have said, well, we have now decided the First Amendment issue, and it is

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inappropriate for nine Justices of the Supreme Court to sit here and decide whether or not this particular Order is the right one or not, and therefore we're going to remand it back to the trial court in Seattle to do that. But they didn't, they said it was clearly on the basis of the record before them that the court had not abused its discretion, and they, therefore, affirmed that Order.

JUDGE HIGGINBOTHAM: Yes, but that was an affirmance.

MR. BRING: Well --

JUDGE HIGGINBOTHAM: If you want an affirmance, I mean it would be very easy.

MR. BRING: I would like the court to affirm Judge Cowen's Order, yes, sir.

JUDGE BECKER: Mr. Bring, one last question, because we're way overtime. You referred in your initial answer to Judge Higginbotham's questions of paragraph two of Magistrate Cowen's Order in which he, Magistrate's Order, in which he provided that: "All information produced or exchanged in the course of this civil action or any appeal arising therefrom shall be used solely for the

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purpose of this case." And he made no limitation to confidential material.

MR. BRING: That's right.

JUDGE BECKER: Now, do you defend that paragraph of his Order?

MR. BRING: I do.

JUDGE BECKER: And if so, on what basis?

MR. BRING: I do, indeed, your Honor.

JUDGE BECKER: And on what authority?

MR. BRING: I defend it on the ground, your Honor, that again we have to put it in the context of the fact that he's trying to set up a structure to manage this case. And the question of how you define the term "confidential" is obviously a very murky one, although it's a lot clearer now, I think --

JUDGE BECKER: He defined everything, by this Order he defined everything as confidential.

MR. BRING: No, he didn't, your Honor. I think for purposes of extra-judicial use of documents, for purposes of use outside this litigation, he did, but for purposes of inside the litigation, basically what he did was set up a two tiered structure: He'd say, look,

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for any document that is going to go outside of this case, whether it's confidential or not, I don't want that to happen, I don't think there's any need for that to happen, I want to get this case ready to go to trial, so no document, whether confidential or not, can be used outside of this case, if it has been obtained by discovery. But with respect to confidential documents, that is a different situation, and he established that in paragraph three of his

Order a different set of rules with respect to who could see those documents, under what conditions, what kind of statements had to be signed and so on, I think that's a perfectly reasonable approach.

JUDGE BECKER: -- not based on any case --

MR. BRING: Well, I think, your Honor, it's based upon, I hate to keep saying this, but I think it's based certainly upon what happened in practice in the Zenith case, because even though the Order there was limited to confidential materials, as your Honor well knows, and as your opinion pointed out --

JUDGE BECKER: His order, not mine.

MR. BRING: But your opinion. The

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practice quickly developed that people were marking almost everything confidential, and nobody really cared or objected to that because that was the way to get the case going, and that was the way to get documents exchanged, and if anybody then had a problem with whether or not some document had been marked inappropriately and should not have been marked as confidential, they could either try to work it out, or bring it to the court at that point. And as your opinion pointed out, nobody ever did that once. Now, we had the same practice going in this case with Mr. Edell on an informal basis, and I suggest, your Honor, that is really the most sensible way of approaching it, if what we're talking about is at the outset of the litigation creating a structure that is going to get the case ready for trial and not involve the parties in endless disputes over discovery. That is as a matter of fact what Judge Cowen had in mind when he entered this Order. And I don't think it's an abuse of discretion for him to have done that.

Thank you, your Honor, I appreciate the extra time.

JUDGE HIGGINBOTHAM: Mr. Edell, we do not make our decision on the amount of time counsel takes to make an argument, but if you feel you need more than the twenty minutes allocated, we will grant you at least an additional ten minutes.

MR. EDELL: I appreciate that, your Honor. I think from the outset, I think we have to straighten out a couple of things. One of which is the manner in which this Protective Order evolved. We had struggled for a year to obtain discovery for the defendants. We finally obtained it through an Order in May of 1984. There was never a discussion regarding confidentiality, Protective Orders or anything else at that time when Judge Cowen issued his Order. It was two months after that Order was issued that the defendants first applied to the court for a confidential designation or Protective Order, if you will. Judge Cowen at that time decided that we would be better off if we tried to work it our together. We tried, there were numerous exchanges of proposed Orders, it's in the record, and it was not until March of '85, that's almost a year later,

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that there was an Order in place. To suggest that Judge Cowen granted the first discovery Order as part of an intrical --

JUDGE BECKER: Why do you need a discovery Order? You serve Interrogatories, you serve a request for production of documents, you serve Notice of Depositions, why does one need a discovery --

MR. EDELL: You sound like me before Judge Cowen, your Honor. I said the same thing. I served document requests, I served deposition notices, I served Interrogatories, and there were objections to each.

JUDGE BECKER: Oh, I see.

MR. EDELL: And there was a hearing held by Judge Cowen to rule with respect to document requests, to deposition notices and the Interrogatories.

JUDGE BECKER: Well, is it your submission, Mr. Edell, that they waived their rights because they gave you documents in discovery before there was a protective Order?

MR. EDELL: I don't think that they waived -- there was an agreement, Judge, that --

JUDGE BECKER: Well, you're not

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claiming waiver; is that right?

MR. EDELL: No, I am not claiming waiver. But I don't want the court to be misled to think that when Judge Cowen entered his Order with respect to these confidential documents and non-confidential documents did so in a time frame where he was taking his discovery Order and the confidential Order in to play, into consideration, in entering both of them, that is not correct.

Now, with respect to the question of good cause, I argued before Judge Cowen the fact that the defendants at no time provided the court with any factual information upon which to enter its Order. If the court reviews Seattle Times, you will see that prior to the initial Protective Order, which was ultimately sustained by the Supreme Court, the Washington Court denied the Protective Order saying that there was insufficient factual information --

JUDGE HIGGINBOTHAM: Counselor, whatever you argued, I submit to you that we have three findings in this case which you have not challenged. The findings are Judge Sarokin, that it was embarrassing and incriminating, and

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the findings which were just cited to us of injury. Now why is that not analogous to the findings which were made in Seattle?

MR. EDELL: Judge Sarokin said the documents may be embarrassing, they may be incriminating, he didn't say that they were, he didn't say that he was entering this Order for good cause shown based on a factual finding in that regard.

JUDGE HIGGINBOTHAM: No, what he said, these matters may be private, and the disclosure may prove embarrassing and incriminating, but that alone would not be sufficient to bar them from the public or the press. As I read that, it seems to me he is saying I am proceeding on, and assuming arguendo, that they are in fact that.

MR. EDELL: Well, I don't know what was going on in his mind, Judge, all I can tell you is that given that factual finding, if you will, his Order contemplates the protection of the defendants in that regard. He says if there are documents that are of the nature contemplated by rule 26, then I will afford you that protection. He provides in paragraph

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thirteen of his Order that, aside from everything else he provided, if there is anything else you want from me, if there is any additional protection that you think is necessary, come back to me, and I will consider it. They never did that.

JUDGE BECKER: If there had been no finding, then shouldn't we send it back and get one?

MR. EDELL: It's a question -- I don't think you need a finding of fact with respect to Judge Sarokin's Order, your Honor.

JUDGE BECKER: I'm talking about whether there's good cause, as to whether it's sensitive commercial information, whether it would harm their business. I understand that you think there's a very rigorous standard, and the case law certainly supports you that they have to make a clear showing, but shouldn't we send it back so that they can have an opportunity to make that clear showing?

MR. EDELL: Judge Becker, that's exactly what Judge Sarokin says in his Order.

JUDGE BECKER: Judge Sarokin said in his Order that they have to come first. Now,

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Mr. Edell, do you maintain that it makes any sense in the management of complex litigation, any sense at all, the Zenith case I had twenty million documents, would it have made sense for them to come to me with each of those twenty million documents, or seven and a half million documents, or a hundred and fifty thousand documents, and say, Judge, our paralegal has a red stamp, and we want to mark it confidential, but we can't do it until you look at it and say so? Would that make any sense at all? Why is this case any different?

MR. EDELL: Judge, it would not make any sense, from the very beginning we asked for, we admitted that there should be some provision for these confidential documents, those that are truly confidential. And we did say, recognizing all of us have been involved in complex litigation before, that there should be some type of initial designation by the defendants of those documents which they truly believed were confidential. What we asked for is if they abused it, because we saw examples of abuse, Judge, if they did abuse it, make them pay for our having to come forward --

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JUDGE BECKER: Judge Sarokin got it backwards. What Judge Sarokin should have done was do it in the usual way, sanction anybody under rule 11, rule 26, I guess it is, that was marking documents confidential that shouldn't have been, do what all -- Judge Sarokin is a wonderful trial judge -- what all good trial judges do, you have the lawyers bring in batches, give me some sample documents, and the judge looks at five or ten or twenty documents and make sample rulings, and the lawyers work it out. Why shouldn't that have happened here?

MR. EDELL: They should have done that, Judge, they should have come forward and said to the court and said here are the types of documents that we are worried about, this is the type of harm, here are the affidavits that are going to support our proposition in that regard, that's what they should have --

JUDGE BECKER: So each side got too much, they got too much from Magistrate Cowen, they got too good an Order from Magistrate Cowen, and you got too good an Order from Judge Sarokin?

MR. EDELL: I would say, Judge, that

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Judge Cowen's Order was clearly wrong and contrary to law and an abuse of discretion. I would not say Judge Sarokin's Order, albeit not the choice of this court in terms of complying with the Manual for Complex Litigation, does not rise to that.

JUDGE BECKER: Is Judge Sarokin correct in narrowing the definition of protectable material to trade secrets under the jurisprudence?

MR. EDELL: What he did say, if you look at his Order, is not necessarily that it's restricted to trade secrets. He said that there, in paragraph thirteen, he says there are other, there may be other instances in which you need protection, therefore, come to me.

JUDGE HIGGINBOTHAM: Well, am I not correct that Judge Sarokin granted you on the designation of confidential materials a scope of relief broader than you had actually asked for?

MR. EDELL: Correct, your Honor.

JUDGE HIGGINBOTHAM: And why were you wrong in asking for less?

MR. EDELL: I was not wrong, I was being maybe more practical at the time. Our ultimate goal was trying to facilitate this

litigation both in terms of this lawsuit and in other lawsuits throughout the country. What Judge Cowen effectively did was to prevent us from either facilitating discovery in this case as well as in other lawsuits.

JUDGE HIGGINBOTHAM: Now, Counselor, if the law's relevant in a case like this, Judge Sarokin's opinion was predicated on, among other things, First Amendment grounds, was it not?

MR. EDELL: Yes, your Honor.

JUDGE HIGGINBOTHAM: If he was wrong in his reading of Seattle Times in terms of the First Amendment – public interest aspect, and we had to enter an Order to deal with the First Amendment, would it not have to be remanded so that a reviewing court would delineate which of the Orders are predicated on rule 26-C solely, and which are predicated on the First Amendment?

MR. EDELL: I don't think so, Judge. I think --

JUDGE HIGGINBOTHAM: Well, looking at

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his conclusion on page A-34, he says: "And therefore constitutes a violation of the First Amendment." If he's wrong in his conclusion, how do we know he would make the same Order if he read the First Amendment issue less expansively?

MR. EDELL: I think you have to look at his Order, Judge.

JUDGE HIGGINBOTHAM: That's what I'm looking at.

MR. EDELL: If you look at his Order -- I thought the court was reading from his opinion. The Order provides for those safety valves contemplated by rule 26, contemplated by the rule for the Manual for Complex Litigation.

JUDGE HIGGINBOTHAM: But the Order is predicated on the opinion, I thought.

MR. EDELL: In part, but we don't know what part is or is not entirely, Judge.

JUDGE HIGGINBOTHAM: That's my problem.

MR. EDELL: I understand what the court is saying, though. With respect to the question of making these documents available in other cases, Judge, I think that it's most important to understand that that is consistent with the

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federal rules of civil procedure --

JUDGE BECKER: Which rule?

MR. EDELL: Rule 1, Judge. That is for the expeditious, speedy, and, hopefully, economically refeasible and reasonable resolution of litigation.

JUDGE HIGGINBOTHAM: But rule 1 doesn't apply to all state courts.

MR. EDELL: I thought rule 1 of the federal rules of civil procedure apply to --

JUDGE HIGGINBOTHAM: Federal courts.

MR. EDELL: Correct, Judge.

JUDGE HIGGINBOTHAM: But under this you could use it in all state courts, and I didn't think the federal courts were concerned about the expedition of litigation in the state court.

MR. EDELL: I thought that was one of the purposes of conferences between the federal bar and federal bench --

JUDGE HIGGINBOTHAM: So you rely fundamentally on rule 1 as the predicate to justify this council? Is that the fundamental core of your argument?

MR. EDELL: To justify what, your Honor?

JUDGE HIGGINBOTHAM: Judge Sarokin's

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Order.

MR. EDELL: I think in part it does,Judge --

JUDGE HIGGINBOTHAM: For the release of documents.

MR. EDELL: Of course. Not in terms of releasing the documents to the public, but in terms of being able to use this information in other cases. Obviously other lawyers may not have the resources or the coordination that we've put together to prosecute these cases.

JUDGE HIGGINBOTHAM: Why can't the other judges in those cases make those judgments? Why should the Third Circuit or the District of New Jersey, despite all of its wisdom, speak for the entire judicial system?

MR. EDELL: You won't have --

JUDGE HIGGINBOTHAM: I can assume that a judge in Arizona could make an independent judgment.

MR. EDELL: There's no question, Judge, we are not talking about evidential decisions. The judge in Arizona, the judge in Pennsylvania, the judge in Alaska will decide what does or does not come in at the time of trial. We are

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simply talking about facilitating discovery. If lawyers have this information, they don't have to go through the long laborious process that we've gone through, they don't have to waste the court's time with multiple motions --

JUDGE HIGGINBOTHAM: I thought it was only a fifteen word Order they have to file.

MR. EDELL: Your Honor, with respect to this fifteen word Order, produce all the documents in this particular case, in my case, I made that same request in this case of the defendants, and Judge Cowen said to me, Mr. Edell, I will not permit you to obtain from the defendants documents that they've produced in other cases. Simple. He said it's an improper discovery request. So had I done that, Judge, I would have been without any discovery.

JUDGE BECKER: They have contended that it was your intention to release this information to plaintiff's counsel in other cases; is that correct? Did you so declare that to be your intention?

MR. EDELL: I never made that statement, Judge. The one letter that was referred to by counsel for the defendants is a letter that I

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wrote to Chuck Ruff, who is counsel for the Tobacco Institute, before any confidential Protective Order was entered in this case, it was an agreement between Mr. Ruff and myself who represented the Tobacco Institute, and it was with respect to discovery only in Cipollone. There were certain documents that I particularly felt were not truly confidential. The way to flush out that question, I'm being candid with the court, was to write to Mr. Ruff to find out whether or not he really meant that they were confidential, because as we saw it, there was an extraordinary abuse of the use of the confidentiality stamp by all the defendants in this litigation --

JUDGE BECKER: In all events, it was your intention to release these to the press; is that correct?

MR. EDELL: That's correct, Judge.

JUDGE BECKER: And you had called a press conference?

MR. EDELL: No. What I had done was simply write a letter to Chuck Ruff, I had not contacted any members of the press -- the purpose behind my writing the letter --

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JUDGE HIGGINBOTHAM: The press is part of the general public, is it not?

MR. EDELL: Yes, your Honor.

JUDGE HIGGINBOTHAM: And in your letter of October 5, 1984 you said you intended to disclose the documents to the general public.

MR. EDELL: As I apparently --

JUDGE HIGGINBOTHAM: I don't care what your motivation was, that's what you said.

MR. EDELL: There's no question about it, Judge.

JUDGE HIGGINBOTHAM: And it would seem to me, in reviewing this record, I could say that counsel for the plaintiff desires to release certain documents to the general public.

MR. EDELL: That's correct. I think the general public has the right to know.

JUDGE HIGGINBOTHAM: Does Seattle Times say that? And if you can show me one sentence in Seattle Times where they speak in terms of general public's right to know.

MR. EDELL: Seattle Times doesn't say that directly, Judge --

JUDGE HIGGINBOTHAM: Does it say it indirectly?

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MR. EDELL: Yes.

JUDGE HIGGINBOTHAM: Can you give me the language, Counsel, which comes closest to making that inference?

MR. EDELL: On page twenty-six, your Honor, "It is, of course, clear -- "

JUDGE HIGGINBOTHAM: I happen to have a Supreme Court Reporter. Page twenty-six, are you looking at the U.S. reports?

MR. EDELL: Yes, your Honor.

JUDGE HIGGINBOTHAM: Okay. Under what heading is that?

MR. EDELL: Roman numeral four, your Honor.

JUDGE HIGGINBOTHAM: Yes, that's where I am. Now, where?

MR. EDELL: "It is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of the court." There's a presumption, I would suggest, in favor of free speech, in favor of disseminating this information, and that if, in fact, the defense

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can prove that they will be harmed --

JUDGE HIGGINBOTHAM: What Justice Powell said, I thought, was critical, he says, "A litigant has no First Amendment rights of access to information made available only for purposes of trying his suit." And I read that, and when he cites the Zummel for that proposition, the fact that even you are a litigant does not mean you have a right of access to information presented under a Protective Order sequence.

MR. EDELL: Judge, I would respectly submit that the way in which this case was written does not make it clear exactly what the court was saying, that's one of the reasons --

JUDGE HIGGINBOTHAM: What do you mean by that?

MR. EDELL: There was a concurring opinion.

JUDGE HIGGINBOTHAM: You mean Justice Brennan and Justice Marshall?

MR. EDELL: Yes, your Honor.

JUDGE HIGGINBOTHAM: That's two votes.

MR. EDELL: I think that is one of the reasons for their opinion because it wasn't clear what was meant by the majority.

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JUDGE BECKER: Those two can't recast the majority.

MR. EDELL: I understand that, Judge.

JUDGE BECKER: There was an opinion just filed last week out of New Jersey by Judge Seitz construing our Brown decision, where the U. S. Attorney relied on what I had said in a concurrence, and Judge Seitz very clearly said that out of eleven there were six votes for the majority, and Becker had two votes, and it didn't mean anything. He was very polite about it, but --

MR. EDELL: Let me ask you this, then, Judge, in terms of this decision, why then did the court find it necessary on page twenty-six, as we continue, to state that, "In addressing the question it is necessary to consider whether the practice in question furthers an important or substantial government interest unrelated to this suppression of expression and whether the elimination of First Amendment freedoms is no greater than is necessary."? If First Amendment freedoms didn't come in to play at all, why would there be that language in the case?

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JUDGE HIGGINBOTHAM: It cites Prokener (phonetic) versus Martinez for that. Do you know what that case involves?

MR. EDELL: I've read all the cases, I don't recall that one off the top of my head.

JUDGE HIGGINBOTHAM: That's the case they cite for -- I think that answers it. It's not this case.

MR. EDELL: The court cited in a subsequent decision that specific language for the proposition that the First Amendment does play a part in this consideration.

JUDGE BECKER: Mr. Edell, if I can move on to another subject, unless you have something, you fend the Mandamus petition here, and I wonder how you get around the language of Judge Sloviter in the Bogosian -- or Judge Seitz language in Sporck?

MR. EDELL: Which language, your Honor?

JUDGE BECKER: Well, the holding, basically. Those were cases where Mandamus was sought to protect confidential information revealed in discovery or developed as part of an attorney's workup of the case, and notwithstanding the rather trenchant anti-Mandamus

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language in a lot of our courts' opinions, Mandamus was ruled proper in most of those instances, and they seem quite similar to this case.

MR. EDELL: Well, in the latter case, I believe, your Honor, it dealt with the question of invasion of the attorney work product and, therefore, if that was forced to be divulged at that juncture, then that issue would be lost forever, that there was no alternate means by which to get that question before this court.

JUDGE BECKER: If confidential information is disclosed to the "general public," how do you get it back?

MR. EDELL: That isn't what Judge Sarokin ruled. Judge Sarokin hasn't ruled anywhere that confidential information should be disseminated to the public.

JUDGE BECKER: Well, what do you do -- this gets back to the question I asked Mr. Bring, this might be different if we were dealing with order number one and nothing had happened,

nothing had been produced, you might not under those circumstances have an appealable order. But, as I understand it, tens of thousands of

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documents have been produced, and unless there is review, they will be disclosed by you to the public tomorrow or the day after or the day after that, the day after the mandate comes down.

MR. EDELL: Judge, there was no Order in place during the entire time period that these documents were being produced.

JUDGE BECKER: I understand. I asked you whether you deemed there to be a waiver, and you said no. So assuming that there's no waiver, is it not the case that the minute we, assuming that we affirm the judges that, bingo, the minute that that mandate comes down, you call a press conference, and the documents are revealed?

MR. EDELL: That's not correct, Judge.

JUDGE BECKER: Well, why not?

MR. EDELL: Judge Sarokin's Order provides a ten day period to apply to the court for a designation of confidentiality of those documents --

JUDGE BECKER: That ten day period is over, isn't it? We extended -- is that the stay after --

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MR. EDELL: That's actually in his --

JUDGE BECKER: The ten day period. Well, how's Cowen going to rule on fifteen thousand documents in ten days?

MR. EDELL: He's not, Judge. But with all due respect, Judge Sarokin has given the defendants the opportunity to come back and say I need more than ten days, I need more than twenty days, I need more than thirty days, there's no reason why, under his Order, we have to consider that in fact he will not grant that.

JUDGE BECKER: So is it your argument this case isn't ripe for disposition, or there's not a mandamusible or appealable Order, that what we have to wait for is for these people to go back, go to Cowen or to Sarokin, get a ruling, and then bring it up?

MR. EDELL: As it stands before this court, yes, your Honor. I think there's nothing wrong with Judge Sarokin's Order whatsoever.

JUDGE BECKER: Well, that's not what -- well, I understand that you're saying that. But what you're also saying is they don't have an appealable or Mandamusible Order until they

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go to Cowen or Sarokin, whoever they're supposed to go to, and mark fifty documents or whatever, and get a ruling, and then they got to come up.

MR. EDELL: I would suggest it's not until the point in time that Judge Sarokin is going to release documents, which should be protected under rule 26, that this court does have jurisdiction.

JUDGE BECKER: Well, he's, by the minute the ten days are up, going to release all these documents not marked confidential, because they relied -- and they're out.

MR. EDELL: But they're not documents that were contemplated by rule 26, Judge.

JUDGE BECKER: Well, they say they were, they say they rely on Cowen's Order that says everything basically only can be used within this litigation except for sort of for your eyes only-type secret-confidential documents.

MR. EDELL: Judge, I think that maybe whoever made that statement misspoke, because there was --

JUDGE BECKER: Well, Mr. Cohn made it.

MR. EDELL: Because there was a year lapse,

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Judge, between when Judge Cowen said you people are to produce discovery in this case and the time a Protective Order was entered by Judge Cowen. During that period of time we conducted depositions, we received documents with both confidential stamps, and documents without having any stamps on them, in fact, the defendants opined to Judge Sarokin and Judge Cowen when I complained about their overuse of the confidential stamp, that, look, Judge, we had to do this on an expedited basis, therefore we stamped more documents confidential than we otherwise would have. So I think the reverse is true, your Honor.

I won't bore the court with the details regarding the experts and the other aspects of Judge Cowen's Order. I would only remind the court that the language in Zenith where the court said that when a Protective Order is entered that is overly broad, which I would submit Judge Cowen's was clearly overly broad under any view of Seattle Times, then that in and of itself is an abuse of discretion and, therefore, Judge Sarokin was right in reviewing the case and in entering the Order he entered.

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Thank you.

MR. BRING: Your Honors, may it please the court, I'll be very brief, your Honor, in rebuttal. I really just want to make one point, actually, and that is to address the question of appealability and mandamusibility and whether or not this Order of Judge Sarokin, if you decide it should be remanded to him for findings, I think they're all tied together.

JUDGE BECKER: Tell us while you're doing it how you satisfy the second prong of Cohen and Beneficial in the wake of Judge Higginbotham's opinion in the New York versus

American Metals Refining case where Judge Higginbotham held that inasmuch as ruling on the discovery question required an examination of the documents, vis-a-vis the underlying merits, that the second prong of Cohen and Beneficial was not met as against their claim, that an examination of the documents here to determine whether or not they would be injurious, damaging and so forth, inevitably involve the reviewing court, whether it be magistrate or judge, with the merits thus depriving the case of appealability status under the second prong

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of Cohen-Beneficial?

MR. BRING: Yes, your Honor, I'll attempt to do that. Let me just address that right at the beginning. I think there is a clear distinction between, between the situation that confronted the court in the U. S. Metals case and this one. There the court was confronted with a single document which was disseminated by the State of New York if the Protective Order didn't apply to it. And the court correctly found, as I read the opinion, because the parties were arguing about whether or not that document had fairly characterized the findings of the test that had been conducted, that in order to assess that, you would, you'd have to get into a discussion of an evaluation of the merits of the case. Here what we're dealing with, your Honor, is a decision at the outset of the litigation by the magistrate to set in place a management technique for getting this case ready for trial. We're talking about a structural issue, whether or not there was good cause to enter an umbrella Protective Order that would govern the protection of documents during the entire

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course of the litigation. That's a structural issue and has absolutely nothing to do with the contents of any particular document. The analogy, I think, with New York --

JUDGE BECKER: Well, if it doesn't, maybe you got a problem with appealability.

MR. BRING: I don't, I don't really think so, your Honor. And that's the point I want to get to. That is, what we have in our

opinion is a clear and undisputable mistake in law by Judge Sarokin in his application of Seattle Times to this issue, and in his First Amendment analysis, that so permeates his decision, it so permeates every aspect of his decision, I think that that is such a clear and fundamental error of law, that is clearly an appealable issue. And what stems from that mistake in law are a series of other mistakes, such as the holding by Judge Sarokin that rule 26 applies only to trade secrets. If you read his opinion carefully, it is clear that he is led to that conclusion because of his views about the First Amendment.

JUDGE BECKER: Mr. Bring, your submission, in whatever the next monster case

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is, if all the lawyers meet and say, following the precepts of the Manual for Complex Litigation, we got to get this thing going right, and the judge enters order number one which covers all, all kinds of details, and if as part of order number one, or as order number two, let's say, the supervising judge enters a confidential Order in which he gets Seattle Times all wrong, and rule 26 all wrong, that before anything happens, you can run to the Court of Appeals and appeal mandamus?

MR. BRING: No, I don't. I understand the court's concern about that, and I don't think that will happen. I think mandamus and the collateral Order doctrine are obviously to be narrowly construed, they're to be applied only to situations where there are clear errors of law, where the supervisory function of this court is called for. Hopefully, after this court renders its decision in this case, there will not be the kind of situation that the court is positing in the future, because there will be the guidance from this court that's necessary. I think if we look at what the real issue is before Judge Sarokin, or was before

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Judge Sarokin, and is here today, is whether or not -- let me put it this way, if we take the First Amendment issue out of the case, because let's assume for the moment that we are correct in asserting that Judge Sarokin was wrong in his First Amendment approach to the case, then the only issue before Judge

Sarokin that appeal should have been whether or not Judge Cowen abused his discretion under the Magistrate's Act in entering the umbrella Protective Order that he did. Now, I suggest to the court that there could be no finding by Judge Sarokin that there was an abuse of discretion in view of Judge Sarokin's own conclusion that these documents are potentially embarrassing and perhaps even incriminating. And for another reason in addition to that, Judge, Judge Sarokin is obviously well learned in the law, he knows that there is no reason to reach out for a constitutional issue if there is a non-constitutional issue upon which he could have ruled. If, in fact, he thought there had been an abuse of discretion, then clearly it seems to me he should have ruled on that basis, instead he went beyond that, never

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talked about an abuse of discretion, assumed to himself to make a de nova decision and ruled on constitutional grounds. That is why we think, your Honor, there is no point or purpose to be served in remanding this case, if you conclude, as I think you should, that Judge Sarokin was incorrect with respect to the constitutional issue. If that is the case, it seems to me clear that Judge Cowen's Order ought to be affirmed and reinstated as a proper exercise of his discretion.

JUDGE STAPLETON: Do you have the appendix there?

MR. BRING: I do, your Honor,

JUDGE STAPLETON: You said that Judge Sarokin limited rule 26-C to trade secret information. Would you look at page A-32 and read the last sentence and footnote number eight, the last two sentences, and tell me what you think they mean? He says "These conclusions are certainly relevant here where the parties concerned is, or ought to be at least in part, competitive injury. Of course rule 26-C seeks to protect parties against 'embarrassment' as well," citing Rhinehart.

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"Moreover, factors such as defendants constitutional right to petition government are also appropriate for consideration." Does that suggest to you that he's ruled out 26-C as protecting anything other than trade secrets?

MR. BRING: Your Honor, it's hard for me to answer, to explain what that language means. All I could say, reading his opinion in totality, including the first sentence of that same footnote, where he says "One court has lifted the considerations pertinent to a determination of whether something is a trade secret," and that footnote qualifies a statement above where he's talking about confidential documents under section seven of 26-C. I think it's a fair reading of his decision that he regards 26-C as applying only to trade secrets if there is a public interest involved, and a First Amendment interest involved. Why he put that other language in there, I can't explain, your Honor, and it does seem to be inconsistent with the position we're taking. But I think the position we're taking is consistent with the opinion in totality and with his First Amendment analysis of the issue.

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JUDGE STAPLETON: Thank you.

MR. BRING: Thank you, your Honor. Thank you very much.

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**Handwritten Order of the District Court in *Palmer* Accompanying Motion of Proposed Intervenor dated August 12, 1985**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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ANN M. PALMER as ADMINISTRATRIX
and ANN M. PALMER
and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

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CIVIL ACTION NO. 83-2445-MA

(Oral Argument Requested)

MOTION FOR RECONSIDERATION OF PROPOSED INTERVENOR, THE WALL STREET JOURNAL

The Wall Street Journal, by its publisher, Dow Jones & Company, Inc. (hereinafter "The Wall Street Journal") respectfully moves for reconsideration of the Court's Orders dated July 16 and July 19, 1985, by which the Court (1) denied The Wall Street Journal's Motion For Leave To Intervene On Limited Issue Of Plaintiffs' Motion for Clarification Or Modification Of Protective Order; (2) denied Plaintiffs' Motion For Clarification Or Modification Of Protective Order; and (3) allowed Defendants' Motion To Require Compliance With Protective Order. The grounds for this motion are as follows:

1. Subsequent to the Court's action on the above-described motions, The Wall Street Journal received notice and a copy of the

Order and accompanying Opinion of the Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, filed on July 17, 1985, in the matter of *Cipollone, et al., v. Liggett Group Inc., et al.*, Civ. No. 83-2864. (Copies of Order and Opinion attached hereto.)

Judge Sarokin's Order and 29-page Opinion are submitted not only because they represent the most thorough analysis to date of the precise issues raised by the motions for which reconsideration is sought, but also because defendants have cited the now-vacated New Jersey protective order in support of the protective order at issue here. Defendants' Memorandum of Law In Support of Their Motion to Require Compliance with Protective Order, footnote at pp. 3-4; Appendix To Defendants' Motion To Require Compliance With Protective Order, Ex. H.

In his Opinion, Judge Sarokin analyzed the impact of the Supreme Court's decision in *Seattle Times Co. v. Rhinehart*, 104 S.Ct. 2199 (1984) on a protective order for all purposes identical to the one entered at defendants' behest in this action. Judge Sarokin concluded that:

> In *Seattle Times*, the Court held the first amendment clearly to be implicated, in light of the great degree of public interest in plaintiff Rhinehart, the leader of a religious group known as the Aquarian Foundation. Much greater is the public interest in this case, involving claims of liability against cigarette companies for failure to warn and other theories.

Sarokin Opinion at 14. Judge Sarokin observed that the Supreme Court itself has cited its decision in *Seattle Times* for the proposition that restrictions on such protected speech must "be no greater than necessary to protect the public interest." *Id.* at 17 (citing *Wayte v. United States*, 105 S.Ct. 1524, 1533 (1985) ).

Judge Sarokin reviewed the protective order entered by the magistrate from the standpoint that "defendants must bear the burden of demonstrating the necessity for each provision of such order." Sarokin Opinion at 20. As is true here, the reasons offered by the defendants in support of the New Jersey protective

order were "quite conclusory" -- that the protective order would streamline the discovery process, and that the information discovered might otherwise be used for some purpose not limited to the trial of the case at bar. *Id.* at 21. Accordingly, Judge Sarokin held that paragraph 2 of the New Jersey protective order, which was identical to paragraph 2 of the order at issue here,

> oversteps the bounds permitted by Rule 26(c), and consequently the first amendment, by limiting the flow of information without any cause whatsoever. The Order will accordingly be altered to cover only confidential information.

*Id.* at 22. As revised by Judge Sarokin, the New Jersey protective order now contains no restrictions on disclosure of discovered information unless it is first explicitly claimed to be, and then agreed by the parties or found by the court to be, "confidential". Sarokin Order, ¶¶ 2, 3.

Judge Sarokin further emphasized that the defendants would continue to bear the burden of showing "good cause" to restrict disclosure of information produced in discovery. Sarokin Opinion at 28.

> To conclude otherwise would unduly restrict the free flow of information mandated by the first amendment. In a case such as this in which the public has a substantial interest, the court is reluctant to inhibit such disclosure absent a showing that there is good cause to do so. What are the risks of smoking; what the tobacco industry knew of those risks; and what action it took or did not take with that knowledge are matters of great public concern. It is difficult to envision that any of those matters involve "secrets" in the traditional sense, worthy of protection against public scrutiny. Indeed they may be secrets in the sense that the industry would prefer them to remain confidential, but not in the sense that their concealment from the press and public would be consistent with the first amendment.

> Litigants are entitled to prove that information released through the compulsion of discovery proceedings should not be made public, and they are afforded the opportunity to do so. However, absent such a showing, information gleaned through discovery should be made available, particularly when the subject matter pertains to issues which affect the health and well-being of millions of persons.

*Id.* at 28-29. In short, Judge Sarokin's Opinion recognized that the public's legitimate and immediate interest in receiving information that may affect its health and safety is protected by Rule 26(c) and the first amendment, and is not limited to that narrow subset of information that may eventually appear on the "public record" of a trial, assuming that a trial occurs.

2. In addition to Judge Sarokin's Opinion, The Wall Street Journal incorporates in this motion the analysis and legal authority set out in its memorandum of law filed in this action on July 16, 1985.

As discussed in that memorandum, The Wall Street Journal has standing to challenge portions of the protective order that, as interpreted by defendants, unduly restrict the free flow of information on a matter of consummate public interest. The earlier memorandum also argued that, in view of the fact that defendants selected the vague language of paragraph 2, as well as the remainder of the protective order, a fair construction of the order would limit its restrictions on disclosure to information designated "confidential." Finally, as discussed in the earlier memorandum, defendants' unsupported and conclusory declaration that dissemination of non-"confidential" documents produced by a non-party might embarrass them is of no weight whatsoever in determining whether defendants have shown "good cause" for restricting voluntary disclosure. There is simply no record in this case, despite defendants' ample opportunity to attempt to create one, on which "good cause" for the blanket restrictions said by the defendants to reside in paragraph 2 can be found.

For all the foregoing reasons, this Court should grant plaintiffs' and The Wall Street Journal's motions for reconsideration, deny the defendants' previous motion and allow the previous motions of plaintiffs and The Wall Street Journal. The Wall Street Journal respectfully requests oral argument on its motion, and estimates that 45 minutes will be sufficient time for all parties to be heard.

By its attorneys,

/s/Bancroft Littlefield, Jr.

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Dated: July 23, 1985

*MOTION DENIED, WITHOUT PREJUDICE TO RENEW.* This motion should be renewed following a ruling by the Third Circuit Court of Appeals.

/s/ A. David Mazzone

U.S.D.J.
8/12/85

**Handwritten Order of the District Court in *Palmer* Accompanying Defendants' Motion dated July 16, 1985**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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ANN M. PALMER AS ADMINISTRATRIX
of the ESTATE OF JOSEPH C. PALMER,
and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

– against –

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

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CIVIL ACTION NO. 83-2445-MA

**MOTION TO REQUIRE COMPLIANCE WITH PROTECTIVE ORDER**

Pursuant to Rules 26(c) and 37 of the Federal Rules of Civil Procedure, defendants Liggett Group Inc. and Liggett & Myers Tobacco Co., Inc. respectfully move this Honorable Court for an order:

(a) Directing plaintiffs and their attorneys to comply with the terms of paragraph 2 of a Protective Order of this Court dated

February 25, 1985 (the "Protective Order") and not to disseminate to Dow Jones & Company, Inc., publishers of *The Wall Street Journal* ("Dow Jones") any of the documents produced to plaintiffs by Arthur D. Little, Inc. and not used at trial; and

(b) Finding that any dissemination or distribution to Dow Jones of any or all of the documents produced in this action by Arthur D. Little Inc. shall be a violation of the terms of Paragraph 2 of the Protective Order, and shall be an act in contempt of court subjecting the violator to punishment.

The facts supporting and grounds for this Motion are as follows:

1. Paragraph 2 of the Protective Order, a copy of which is attached as Exhibit A in the Appendix to Defendants' Motion to Require Compliance With Protective Order (the "Appendix "), provides as follows:

> All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.

Paragraph 16 of the Protective Order further provides as follows:

> Any party may apply to this Court at any time, upon proper notice, for a modification of this Protective Order with respect to the handling or description of any document or for any other purpose.

2. Plaintiffs have never sought to utilize the provisions of Paragraph 16 by moving to modify or vacate any of the terms of the Protective Order, nor have they moved to reargue or appeal the Order.

3. Plaintiffs have twice sought and obtained protective orders whose provisions are virtually identical to those of the Protective Order in limiting the extrajudicial use of information obtained through discovery. *See* Plaintiffs' Motion for Protective Order, dated January 7, 1985, allowed by Order of the Court dated

January 25, 1985 (Appendix Exhibit B); Stipulation and Protective Order dated January 17, 1984 (Appendix Exhibit C). The grounds used by plaintiffs to support their protective order was their counsel's claim that public disclosure of private material would cause "embarrassment and harrassment." (Exhibit B ¶¶ 3-4).

4. By letter dated June 7, 1985 (Appendix Exhibit D), Foley, Hoag & Eliot, attorneys for Dow Jones, advised the Court that their client wished to obtain access to certain documents produced in discovery to plaintiffs. Implicit in the June 7, 1985 letter is Dow Jones' recognition that the Protective Order prohibits plaintiffs from unilaterally disseminating to Dow Jones any document produced in discovery and not used at trial or made part of the public record. By letter dated June 13, 1985 (Appendix Exhibit E), defendants' counsel advised Dow Jones that it had advised the Court that it would oppose such a motion.

5. Immediately thereafter, and in disregard of Paragraph 2 of the Protective Order, plaintiffs' counsel, in a document entitled "Notice of Intent to Disseminate Documents" (the "Notice of Intent") (Appendix Exhibit F), announced their intention to turn over to Dow Jones documents produced in this action by Arthur D. Little Inc. Plaintiffs' counsel further state in the Notice of Intent that only "intervening action by this Court" will prevent them from disseminating documents to the Dow Jones.

6. Dissemination to Dow Jones of documents received by plaintiffs in discovery is not the use of documents "solely for the purpose of this case" and thus violates Paragraph 2 of the Protective Order.

7. As demonstrated in the accompanying memorandum of law, it was within the discretion of the Court to enter the Protective Order restricting the use of discovered information to "solely for the purpose of this case." Not only has this Court ordered such restrictions on two other occasions at plaintiffs' request, other courts have also issued essentially identical orders in cases in which claims are made against companies in the cigarette industry. *See Barnes v. R.J. Reynolds*, Civ. Action No. 84-56 (D. N.J. Order docketed November 11, 1984); *Cipollone*

*v. Liggett Group, Inc.*, Civ. Action No. 83-2864 (D. N.J. Order docketed April 1, 1985, Appeal to the District Court filed) (Appendix Exhibits G&H).

8. Plaintiffs use of information obtained through the discovery process for purposes wholly unrelated to the prosecution of this case would be an abuse of this Court's processes. The law clearly empowers this Court to prevent plaintiffs' counsel from conducting a media trial by feeding to the press selective material, obtained by plaintiffs in discovery ostensibly for the purpose of prosecuting their case. Further, it would also be inherently unfair to permit plaintiffs to obtain a protective order based solely on a claim that public disclosure of their records "may cause undue embarrassment and harrassment" and deny that same relief to defendants when they seek such protection based, in part, on the same grounds.

Accordingly, it is respectfully submitted that the instant motion to enforce the terms of the Protective Order be granted.

Dated: June 28, 1985

Webster & Sheffield

By: /s/ James V. Kearney

James V. Kearney
Co-Counsel for Defendants
1 Rockefeller Plaza
New York, New York 10020
(212) 957-9800

*MOTION ALLOWED.* The dissemination of this material will not aid in the fair trial of this case. The trial is public and the Wall Street Journal is, of course, able to attend the trial.

By: /s/ A. David Mazzone

U.S.D.J.
July 16, 1985

**Order Of The District Court**
**dated February 25, 1985**

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ANN M. PALMER, as Administratrix
of the Estate of JOSEPH C. PALMER,
and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC., and
LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

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No. 83-2445-MA

United States District Court,
District of Massachusetts,
Decided February 25, 1985

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**PROTECTIVE ORDER**

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED AND DECREED that:

1. All counsel and their employees shall be and are hereby prohibited and enjoined from disclosing to or otherwise discussing with any person any confidential information (as herein defined), except as provided hereafter.

2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.

3. "Confidential information" as used herein means any information which is designated as "confidential," whether it be a document, information contained in a document, information

revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as confidential only upon the good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.

4. Documents containing confidential information shall be designated as confidential by placing the word "CONFIDENTIAL" or the following label (or a substantial equivalent) on the original of the document:

"CONFIDENTIAL"

"PAGES/ PARAGRAPHS/ LINES ____ THROUGH ____ OF THIS DOCUMENT ARE SUBJECT TO A COURT ORDER AND THIS DOCUMENT AND THEIR CONTENTS SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER."

In lieu of placing this label on the original of the documents, the party may place the label on the copies of the documents that are produced.

5. Confidential information which is disclosed at a deposition must be designated as confidential by indicating on the record at the deposition, or in writing to all counsel within ten days following receipt of the deposition transcript by counsel so designating, that the testimony is confidential and subject to the provisions of this Court Order with regard to confidentiality.

6. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and defendants in this litigation, any lawyers specifically employed by them in connection with the litigation and any employee of such counsel assisting with this litigation;

(b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation.

7. Each person, other than those described in §6(a), to whom designated confidential information or documents are to be disclosed shall, prior to such disclosure, agree in writing under oath or attestation to the following, a copy of which shall forthwith be furnished to all counsel:

> I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of , 1985, in *Palmer v. Liggett Group, Inc., et al.*, the United States District Court for the District of Massachusetts; that I have been given a copy of and have read the Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except in accordance with the Protective Order, such information or documents, and that such information or documents shall be used only for the purposes of the legal proceeding in which they were produced. I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of court, imposed by the Court, for such a failure.

Copies of this attestation shall be served upon all counsel prior to such disclosure; in lieu of such service, copies of the attestation signed by medical experts may be filed under seal with the Court, for the period prior to the identification of such experts in pre-trial discovery.

8. No summary or copy of any designated confidential information or document shall be made by any person, other than

at the express direction of the attorney to whom disclosure was first made. Any such summary or copy shall be subject to the terms of this Protective Order to the same extent as the information or document from which such summary or copy is made.

9. Inadvertent disclosure of any document or other information during discovery in this action shall be without prejudice to any claims that such material is confidential, privileged or otherwise protected from discovery within the meaning of Federal Rule of Civil Procedure 26(b)(3), and no party shall be held to have waived any rights by such inadvertent disclosure. Any document or information so produced and subject to a subsequent claim of privilege, work product or other protection, shall be returned immediately to the appropriate party and such document or information shall not be introduced into evidence in this or any other proceeding by any person without (i) the consent of said party or (ii) by order of the Court, not will such document or information be subject to production (other than *in camera*) in any proceeding by virtue of the fact that it was inadvertently produced in this proceeding.

10. Prior to the disclosure of any confidential information to any person, other than outside counsel and their employees or medical experts, the party seeking disclosure shall advise counsel and the Court, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose, for the purposes of this litigation, said confidential information. Within twenty (20) days after such advice, counsel to whom notice is given may give written permission for such disclosure or may give written notice to adverse counsel of an application to this Court for an Order prohibiting the proposed disclosure. No such disclosure shall take place until the Court has acted upon such application. In the absence of notice of such application, the party seeking disclosure may proceed, after expiration of said twenty (20) days with the disclosure proposed.

11. The Clerk of the Court is directed to maintain under seal all documents and transcripts of deposition testimony filed in this litigation which have been designated, in whole or in part, as "confidential" pursuant to the terms of this Order.

12. In the event that any information or documents subject to the confidentiality restrictions of this Protective Order is used in pre-trial depositions, briefs, or other documents filed with the Court, or is referred to in any hearing before the Court, such use or reference shall be made under seal and bear the legend,

> "THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER: THE CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT."

and/or be reviewed by the Court *in camera* with the public excluded.

13. Within forty-five days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of documents, and all information and notes derived from them, also shall be destroyed. Compliance with this provision shall be certified to by all counsel for the obtaining party or parties.

14. Nothing herein shall be deemed to restrict in any manner the use by any party of its own documents or materials.

15. Nothing herein shall affect the right of any party to seek additional protection against the disclosure of any documents or materials.

16. Any party may apply to this Court at any time, upon proper notice, for a modification of this Protective Order with respect to the handling or designation of any document or for any other purpose.

17. This Order shall be binding upon any future party to this litigation.

/s/ David A. Mazzone

David A. Mazzone
United States District Judge
February 25, 1985

**Order of the District Court In *Barnes***
**dated November 27, 1984**

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ANN MARIE T. BARNES,

Plaintiff,

—v.—

R. J. REYNOLDS TOBACCO CO., et als.,

Defendants.

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No. 84-56

United States District Court,
District of New Jersey,
Decided November 27, 1984

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**PROTECTIVE ORDER**

This matter having been opened to the Court by Riker, Danzig, Scherer & Hyland, attorneys for the defendant R.J. Reynolds Tobacco Company (hereinafter RJRT), on application for a Protective Order, and the court having considered the moving and opposing papers,

And it appearing that the plaintiff's demands for the production and inspection of RJRT documents and records may require the disclosure of confidential records and private information, which disclosure may be necessitated by reason of this or similar cases brought by the undersigned plaintiff's counsel and in which RJRT is a defendant, but which should otherwise remain confidential and the private property and information of RJRT:

And it further appearing that the parties are agreed that the confidential business records and private information of the defendant RJRT should be given the protection of an order of this Court to prevent injury to and invasion of the confidential property of RJRT by reason of any disclosure not otherwise necessitated by the parties' lawful interests in this litigation only, and good cause appearing;

It is hereby ORDERED on this 27th day of November 1984 that:

1. All counsel and their employees shall be and are hereby prohibited and enjoined from disclosing to or otherwise discussing with any other person any confidential information (as herein defined), except as provided hereafter.

2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this or similar cases brought by the undersigned plaintiff's counsel and in which RJRT is a defendant.

3. "Confidential information" as used herein means any information which is designated as "confidential" by defendant RJRT, whether it be a document, information contained in document, information revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as confidential only upon the good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.

4. Documents containing confidential information shall be designated as confidential by placing the following label (or a substantial equivalent) on the original of the document:

"CONFIDENTIAL"

"PAGES/PARAGRAPHS/LINES _____ THROUGH _____ OF THIS DOCUMENT ARE SUBJECT TO A COURT ORDER AND THIS DOCUMENT AND THEIR CONTENTS SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER."

In lieu of placing this label on the original of the documents, the party may place the label on the copies of the documents that are produced.

5. Confidential information which is disclosed at the deposition of any of RJRT's present or former officers, directors, employees, agents, or independent experts retained for purposes of this litigation must be designated by RJRT as confidential by indicating on the record at the deposition, or in writing to plaintiff's counsel within 10 days following receipt of the deposition transcript by RJRT counsel, that the testimony is confidential and subject to the provisions of this court order with regard to confidentiality.

6. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and co-defendant(s) in this litigation, any lawyers specifically employed by them in connection with the litigation and any employee of such counsel assisting with this litigation;

(b) Counsel of record for RJRT, any lawyers specifically employed by RJRT in connection with this litigation, and any employee of such counsel assisting with this litigation;

(c) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation.

7. Each person, other than those described in §§6 (a) and (b), to whom designated confidential information or documents are to be disclosed shall, prior to such disclosure, agree in writing under oath or attestation to the following, a copy of which shall forthwith be furnished to all counsel:

> I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of 1984, in *Barnes v. R. J. Reynolds Tobacco Co., et al.*, the United States District Court for the District of New Jersey; that I have been given a copy of and have read the Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except in accordance with the Protective Order, such information or documents, and that such information or documents shall be used only for the purposes of the legal proceeding in which they were produced. I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of court, imposed by the Court, for such a failure.

Copies of this attestation shall be served upon all counsel prior to such disclosure; in lieu of such service, copies of the attestation signed by plaintiff's medical experts may be filed under seal with the court, for the period prior to the identification of such experts in pretrial discovery.

8. No summary or copy of any designated confidential information or document shall be made by any person, other than

at the express direction of the attorney to whom disclosure was first made. Any such summary or copy shall be subject to the terms of this Protective Order to the same extent as the information or document from which such summary or copy is made.

9. Inadvertent production of any document or other information during discovery in this action shall be without prejudice to any claims that such material is confidential, privileged or otherwise protected from discovery within the meaning of Federal Rule of Civil Procedure 26(b) (3), and no party shall be held to have waived any rights by such inadvertent production. Any document or information so produced and subject to a subsequent claim of privilege, work product or other protection, shall immediately be returned to RJRT and such document or information shall not be introduced into evidence in this or any other proceeding by any person without either (i) the consent of RJRT or (ii) by order of the Court, nor will such document or information be subject to production (other than *in camera*) in any proceeding by virtue of the fact that it was inadvertently produced in this proceeding.

10. Prior to the disclosure of any confidential information to any person, other than as provided in paragraph 6, the party seeking disclosure shall advise counsel for RJRT and the Court, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose, for the purposes of this litigation, said confidential information. Within twenty (20) days after such advice, counsel for RJRT may give written permission for such disclosure or may give written notice to adverse counsel of an application to this Court for an Order prohibiting the proposed disclosure. No such disclosure shall take place until the Court has acted upon such application. In the absence of notice of such application, the party seeking disclosure may proceed, after expiration of said twenty (20) days with the disclosure proposed.

12. In the event that any information or documents subject to the confidentiality restrictions of this Protective Order is

used in pretrial depositions, briefs, or other documents filed with the Court, or is referred to in any hearing before the Court, such use or reference shall be made under seal and bear the legend,

> "THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER; THE CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT,"

and/or be reviewed by the Court *in camera* with the public excluded.

13. Within 45 days after the final adjudication or settlement of all claims in this or similar cases brought by the undersigned plaintiff's counsel and in which RJRT is a defendant, counsel for the parties shall either return all documents produced to RJRT, if so requested by the producing party, or shall destroy all such documents. All copies of documents, and all information and notes derived from them, shall also be destroyed. Compliance with this provision shall be certified to by all counsel for the obtaining party or parties.

14. Nothing herein shall be deemed to restrict in any manner the use by RJRT of its own documents or materials.

15. Nothing herein shall affect the right of any party to seek additional protection against the disclosure of any documents or materials.

16. Any party may apply to this Court at any time, upon proper notice, for a modification of this Protective Order with respect to the handling of any document or for any other purpose.

17. This Order shall be binding upon any future party to this litigation.

18. Counsel for the plaintiff may apply for relief from the terms of this order should it appear, in their good-faith judgment, that a document or documents have been improperly labeled as confidential.

19. This Order is entered without prejudice to the parties' rights to apply for modification or vacation either during or subsequent to this litigation.

/s/ John W. Devine

JOHN W. DEVINE
United States Magistrate